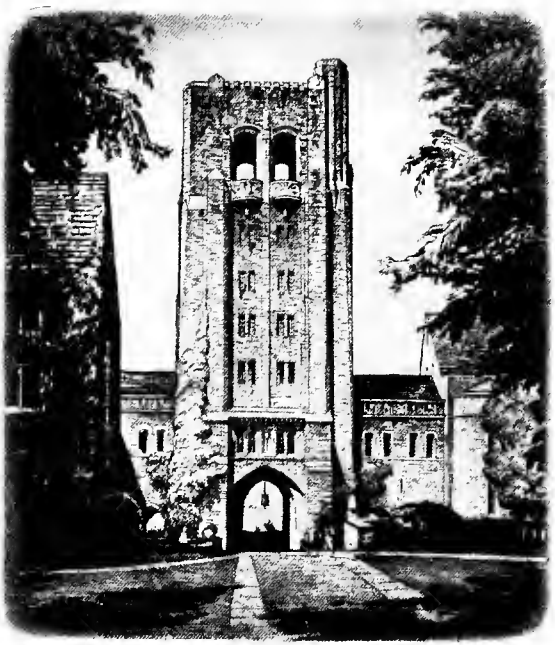

A

TREATISE ON PRACTICE

IN THE

ORPHANS' COURT

BY

F. CARROLL BREWSTER, LL. D.

IN TWO VOLUMES

Vol. II.

PHILADELPHIA

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CHAPTER XIII.

SALES OF REAL ESTATE OF DECEDENTS.

Sales may be effected in various ways, of the realty whereof persons die seised.

I. Where a contract of sale has been made in the lifetime of the owner.

II. Where a power of sale exists in the will.

III. Where there is a ground rent, a mortgage or judgment.

IV. Where the personalty is insufficient for the payment of debts.

V. Where interests of minors or *cestuis que trustent* will be promoted.

VI. Under the Price Act.

VII. Under proceedings in partition.

These will be considered in their order:

I. Where a Contract of Sale Has Been Made in the Lifetime of the Owner.

A number of statutes have been passed upon this subject:

(*a*) The Acts of March 31, 1792; March 12, 1804; March 10, 1818; February 5, 1821; February 24, 1834; February 8, 1848; April 9, 1849; April 3, 1851.

(*b*) Lastly, the Price Act, April 18, 1853 (P. L., 503), contains a provisions as to parol contracts.

When it is to be remembered that in most cases a bill for a specific performance may be brought, it would seem that an abundance of remedy exists.

§4668 Holder of Decedent's Contract for Sale of Realty Shall, Before Suit Brought, Prove the Same —Probate to be Recorded—Executors or Administrators May Petition—When and How Court May Decree—Effect of Deed.

Any person or persons having any contract in writing or other *written* evidence of contract, whereby any deceased person or persons, hath or have covenanted, agreed, promised or bound him, her or themselves to convey any lands or tenements within this Commonwealth, to him, her or them, or to any person or persons whom he, she or they may represent, which contract had not been complied with in the lifetimes of the deceased, and no sufficient provision for the performance of such contract or contracts appears to have been made by the decedent in his lifetime; such person or persons having such contract, or evidence of contract, whether in his, her or their own right, or as attorney, agent, trustee or guardian for another or other, shall, before he, she or they bring any action or suit thereon, against the executors or administrators of the deceased, cause and procure the said contract to be proved in the Supreme Court of this Commonwealth, or in the Court of Common Pleas of the county wherein the lands or tenements contracted for shall lie; which probate being adjudged by the said court to be sufficient, the Prothonotary of such court shall indorse on or annex the same to the said contract, or to a copy of the evidence thereof, and certify the same under his hand and the seal of the said court, and thereupon the same shall be recorded (in the rolls office of this Commonwealth or) in the office for recording of deeds of the county wherein the lands and tenements contracted for shall lie; and thereupon it shall and may be lawful for the executors or administrators of the deceased, or the survivor or survivors of them, to present a

petition to the said courts, respectively, praying leave to make and execute a deed, conveying to the purchaser or purchasers, his, her or their heirs, or assigns, the said lands and tenements contracted for, with the appurtenances, for such estate or estates, and in such manner and form as the said court shall judge to be consistent with the true intent and meaning of the contract; and the said court having considered the prayer of the said petition, and the contract or evidence of contract, whereupon it is founded, and having adjudged the same to be obligatory between the parties, shall make an order authorizing and empowering the said petitioner or petitioners to make and execute such conveyance as aforesaid; and the same being made and executed, and proved or acknowledged according to law, shall be of the same force and effect to pass and vest the estate intended, of and in the lands and tenements aforesaid, with the appurtenances, as if the same had been executed by the decedent or decedents, in his, her or their lifetime. (Act March 31, 1792, §1, 3 Sm., 66.)

§ 4669 Executors or Administrators May Prove Decedent's Counterpart of Contract for Payment of Consideration for Lands and They May Petition the Court—No Deed Made Shall Discharge Lien of Purchase Money Until it be Paid or Secured.

It shall and may be lawful to and for the executors or administrators of any such decedent, having a counterpart of such contract, or any other contract, or evidence of contract, for the payment of the consideration moneys, for any lands or tenements agreed to be sold, but not conveyed by the decedent or decedents in his, her or their lifetime, to cause the same to be proved, and to present a petition in manner aforesaid, whereupon the same proceedings shall be had, and with the same force and effect as is hereinabove directed, where the purchaser or his representative shall procure such contract to be proved: *Provided always*, That no deed to be executed in pursuance of this act shall discharge the lands and tenements to be thereby conveyed from the lien of the consideration money therefor until it shall be actually paid or secured according to the terms of the contract. (*Ibid*, §2, 3 Sm., 66.)

The plaintiff is not entitled to damages or costs for non-performance of the contract if the executor or administrator be not allowed six weeks after the next court to apply for leave to execute the deed, and if executor, etc., be always ready and produce before the trial a proper deed, etc. (*Ibid*, §3.)

§ 4670 Executor of an Executor, and Administrator De Bonis Non May Convey Lands Under Act of 1792.

In all cases that have or may hereafter happen, the executor of an executor, the administrator *de bonis non*, or in other words, the administrator of the goods unadministered, and so on in succession, shall have equal powers with executors and administrators, in the first instance, by leave of court, to convey lands and tenements contracted for with their first decedents, agreeably to the provisions of the act, entitled, "An act to enable executors and administrators, "by leave of court, to convey lands and tenements contracted for "with their decedents, and for other purposes therein mentioned," passed the 31st day of March, Anno Domini 1792. (Act March 12, 1804, §1, 4 Sm., 158.)

A commission may issue to examine witnesses, etc. (Act February 5, 1821, §2, 7 Sm., 357.)

Parol contract may be proved before the Common Pleas, but it must have been so far in part executed as to render it unjust to rescind it, and it must appear that no sufficient provision has been made by the decedent in his lifetime. The petition must set forth the terms of the contract, its date, a description of the lands, how far it was in part executed, etc.; the prayer is for the examination of the witnesses and the establishment of the contract.

Notice must be given to executors and to all parties in interest. The examination must be in writing and filed.

If the court be satisfied, they adjudge the proof to be sufficient, annex or indorse this on the petition, and the Prothonotary certifies it.

The adjudication is recorded in the office of the Recorder of Deeds.

Executors or administrators petition for leave to convey. The court having considered the petition, contract and evidence, and having adjudged it to be obligatory, make the order for execution of the conveyance.

See this at length. (Act March 10, 1818, §1, 7 Sm., 79.)

§ 4671 In Parol Contracts, Executors and Administrators Shall Have the Remedy Provided by Act of March 31, 1792, §2.

The remedy provided for executors or administrators of decedents by the second section of the act to which this is a further supplement, for enforcing the payment of the consideration-money upon contracts mentioned in that act, shall be and it is hereby extended to the case of parol contracts mentioned in the preceding section. (Act March 10, 1818, §2, 7 Sm., 79.)

Administrators, etc., Are Within the Act.

The third section of the law requires that all actions upon parol contracts, shall be subject to the provisions of the third section of the act to which this is supplementary, and that executors, administrators c. t. a. and *de bonis non* shall be within its provisions.

The Common Pleas may order a co-executor or co-administrator to convey to his colleague when a decree is entered upon a parol contract, under the act of March 10, 1818, above cited, and if there be no co-executor, the deed shall be delivered by the Sheriff. Act of April 3, 1851, §6 (P. L., 307).

This is following, as to the Court of Common Pleas, the power conferred upon the Orphans' Court by the Act of April 9, 1849 (P. L. 511).

§ 4672 Power Conferred on Orphans' Court to Decree Specific Performance.

The Act of February 24, 1834, supplies a very plain remedy. The fifteenth section provides in substance that:

"Whenever any person shall by * * * contract in writing "bind himself to * * * convey real estate * * * and shall "die possessed * * * without having made sufficient provision "for the performance of such * * * contract, * * * the "executors or administrators, * * * or the purchaser or other "person interested, * * * may apply by * * * petition "to the Orphans' Court having jurisdiction of the accounts of the "executors or administrators setting forth the facts, * * * and "after due notice * * * to purchaser, executors, adminis- "trators, heirs, devisees * * * as case may require to * * * "answer, * * * such court shall have power, if the facts * * * "be sufficient in equity and no sufficient cause be shown to the con- "trary, to decree specific performance of such contract." (Br. "Purd., 330, §10, P. L., 1834, p. 75.)

Parol Contracts.

The sixteenth section extends the foregoing provisions to all cases where "parol contract shall have "been entered into" and it "shall have been so far "executed that it would be against equity to rescind "the same." (Br. Purd., 330, §11; P. L., 1834, p. 75.)

Decree of Orphans' Court May be Recorded.

The seventeenth section provides that the decree of the Orphans' Court for specific performance, certified by the Clerk under the seal, may be recorded in the Recorder's Office of the county where the real estate is situated with the same effect as deeds are recorded. (Br. Purd., 331, §12; P. L., 1834, p. 75.)

Duty of Executor to Convey.

The eighteenth section makes it the duty of the executor or administrator to execute the conveyance as directed by the court. (Br. Purd., 331, §13.)

When Executor is Purchaser, Co-Executor or Sheriff Conveys.

The Act of April 9, 1849, §2, makes it the duty of the co-executor or co-administrator to convey where his colleague is the grantee, and if there be no co-executor, etc., the Sheriff delivers the deed. (P. L., 511; Br. Purd., 331, §14.)

Where One of Two Vendors Dies.

The Act of February 8, 1848, §1 (P. L., 27; Br. Purd., 331, §15), extends the provisions of the foregoing acts to cases where there are two vendors and one vendor dies, so far as to authorize the executors or administrators to deliver a deed, first giving bond to be approved by a Judge for the faithful application of all moneys received.

§4673 Jurisdiction of Common Pleas in Cases of Contracts for Sale of Lands.

Under the foregoing citations the Common Pleas has jurisdiction over the contract of a decedent for the sale of his realty:

1. *By the Act of 1792*, to receive proof of the contract, to adjudge it sufficient after it is recorded, to consider the petition of the executors or administrators, or of the executor of the executor, or of the administrator *de bonis non*, and to order them to execute the conveyance.

The proceedings must be in the county where the land lies. There must be written evidence of the

contract, it must not have been complied with, and it must appear that no sufficient provision has been made for compliance in the lifetime of the decedent.

No conveyance can discharge the lien of the purchase money until actually paid or secured.

2. *By the Act of 1818*, the Common Pleas may receive proof of parol contracts, when so far in part executed as to render it unjust to rescind them; may, after notice, etc., adjudge the proof sufficient and after record of this may act upon the petition of executors or administrators, administrators c. t. a. or d. b. n., for leave to convey.

§ 4674 The Jurisdiction of the Orphans' Court.

1. *Under the Act of 1834*, on a written contract—may be likened to a bill for specific performance. On parol contracts it is like the jurisdiction of the Common Pleas already sketched.

2. *Under the Price Act.* This is considered in the chapter entitled Price Act.

§ 4675 Practice as to Contracts for Sale of Land—Requisites of the Petition.

Counsel should be particular to set forth the whole contract; to attach a copy, if in writing, to aver the terms with precision, what was paid, or done under it. If in parol it must be clearly charged that it has been so far executed as to render it unjust to rescind it, and the particulars to support this averment must be given. The date of the death, copy of the will, if any, who have received letters, names of widows (of devisees, if will), of children or heirs must all be stated. The petition must show that the land is in the county where the petition is filed and strictly follow the words of the act.

Notice must be given to every party in interest of the filing, the day fixed for hearing, etc.

The decree should recite the petition, the notice, the proof of its service on parties not attending, the hearing, the proofs, that the court adjudges, etc., quoting the language of the act.

§ 4676 Form of Petition to Enforce Performance of a Written Contract Made with a Decedent in His Lifetime.

IN THE ORPHANS' COURT FOR THE COUNTY OF PHILADELPHIA.

In the matter of the estate of A. B., deceased.

October Term, 1892. No. 100.

To the Honorable, the Judges of the said Court:

The petition of C. D. respectfully represents:

1. That A. B., late of the County of Philadelphia, died on or about the second day of October, 1891, intestate, and that letters of administration upon his estate were granted by the Register of Wills of Philadelphia County, October 10, 1891, to E. F., G. H. and J. K.

2. That the said A. B. died seised of the following described real estate, situate in the county aforesaid: (Here insert description of real estate as to which specific performance is prayed.)

3. That the said A. B. in his lifetime, to wit, on or about the day of , 1891, agreed with your petitioner in writing, to convey unto him the said above-described real estate in consideration of the payment by your petitioner of the sum of dollars, and to make and execute to your petitioner a good and sufficient deed in fee simple for the same. A copy of said agreement is hereto annexed as part hereof, marked "Exhibit A."

4. That your petitioner at the time of the execution of said agreement paid to the said A. B. the sum of dollars on account of the purchase money of said property. Subsequent to the date of said agreement your petitioner was given possession of said premises, but a deed therefor has never been executed and delivered to him. (State any other matters which will help the petitioner.)

5. That no provision for the performance of said contract was made by the decedent during his lifetime.

Wherefore your petitioner, further showing that since the death of the said A. B. he has tendered to his administrators the balance of the purchase money for said premises, with interest, and that the petitioner has done all things on his part agreed to be performed, prays your Honorable Court to award a citation directed to the said E. F., G. H. and J. K., administrators as aforesaid, and to L. M., N. O. and P. R., the heirs-at-law of the said A. B., deceased, commanding them to appear and to show cause why a decree for a specific performance of said agreement should not be entered and a deed thereunder executed and delivered to the petitioner, in fee simple.

And your petitioner will ever pray, etc.

(Affidavit.)

(Attach copy of agreement.)

The above form can readily be changed to meet the case of a contract by parol.

§ 4677 Petition Should Aver Petitioner's Performance.

A petition which prays for a decree of specific performance of an agreement for the purchase and sale of real estate, should aver that the petitioner has performed the agreement on his part or that he is willing and prepared to perform it. An omission to make such averment is, however, a defect in form, which may be amended. *Chess' Appeal*, 4 Pa. St., 52 (1846).

§ 4678 Possession by Vendee—Performance by Him—Improvements, etc., Authorize Decree on a Parol Contract.

In *Simmons' Estate*, 140 Pa. St., 567 (1891), proof was made of a parol contract for the sale of real estate by the decedent in his lifetime; that in pursuance thereof the vendee took possession, paid part of the purchase money and made improvements. Upon the

petition of the decedent's executor a decree for specific performance was entered on payment of the balance of the purchase money due.

§ 4679 When Orphans' Court Remedy Exclusive.

In case of a parol contract for the sale of land, followed by the vendor's death, the exclusive remedy of the vendee is in the Orphans' Court. An ejectment in the Common Pleas cannot be sustained. *Myers* vs. *Black*, 17 Pa. St., 193 (1851).

§ 4680 Unnecessary Delay Bars the Claim—Ejectment Will Not Lie.

Porter vs. *Dougherty*, 25 Pa. St., 405 (1855), LOWRIE, J.:

"The plaintiff claims this land under a grant "from his mother, and he fails because she had "no equity. One who desires to enforce specific per- "formance of a parol contract for the purchase of land "must present his claim without any unnecessary "delay and while affairs remain in such condition that "performance can be enforced without injury to others, "and especially he must not himself have done any "act that is incompatible with his claim for perform- "ance, or that makes such a claim inequitable.

"Here eleven years elapsed between the breach "of the alleged contract by the plaintiff's grandfather, "when he claimed and got back the land from the "plaintiff's mother, and the bringing of this suit. In "the meantime the grandfather made considerable "improvements on the land and then died, having "made his will devising away to his children this and "his other land. The devisee of this portion is in "posession of it as part of her share of her father's "estate, and must lose it if this claim succeeds; and

"the plaintiff's mother was bequeathed one hundred "dollars, and it was paid to her.

"These circumstances very obviously set aside "the equity on which the plaintiff relies, if it ever "existed, which is very doubtful. Besides this, eject- "ment is not the proper form of remedy for enforcing "specific performance of such a contract against the "estate of a decedent."

§4681 When the Proceeding Must be in Common Pleas.

White vs. *Patterson*, 139 Pa. St., 429 (1891), McCollum, J.:

"The jurisdiction of the Orphans' Court to "decree specific performance of a contract for the sale "of real estate in this Commonwealth, is confined to "cases in which the vendor died seised or possessed of "such real estate, without having made any sufficient "provision for the performance of his contract. It "does not extend to lands which he has conveyed to "another, and in which, at the time of his death, he "has neither a legal nor an equitable estate. In such "case, the living holder of the legal title is the trustee "of it for the equitable owner, and to him the latter "must look for a conveyance, in consummation of the "contract. If the trustee decline to execute a deed "when requested, the Orphans' Court cannot inter- "vene to compel him to do so. The fact that his "grantor is dead does not subject him to its process. "The only remedy of the equitable owner in posses- "sion is a bill for a conveyance of the title which is "unlawfully withheld from him, and the proceeding is "in the Court of Common Pleas."

§ 4682 Who to be Made Parties.

Simmons' Estate, 140 Pa. St., 567 (1891), PERSHING, P. J. (Schuylkill County):

"In *Anshutz's Appeal*, 34 Pa. St., 375, it was held "that when both the vendor and vendee of real estate "are deceased, intestate, upon a proceeding in the "Orphans' Court by the administrators of the vendor, "to enforce the specific performance of a contract, the "administrator and heirs of the vendee, and all per- "sons deriving title under them, or interested in the "contract, must be made parties. Mr. Justice READ "also said: 'and for security the heirs of the vendor "'must also be notified.' But this was corrected in "*Ass'n* vs. *Reed*, 80 Pa. St., 38–48. It is decided in "that case that when the application for specific per- "formance of a contract for the sale of lands is made "by the executor or administrator of a decedent, "notice to his widow and heirs is not necessary. By "the contract for the sale of land, the estate of the "decedent is converted into personalty, over which "the personal representatives have absolute control."

II. Power of Sale in Will.

§ 4683 In Case of Devise of Land to be Sold, if the Executor Die, the Surviving Executor May Sue for Recovery of Land for Trespass, May Convey, etc.

In all cases wherein testators have devised, or may hereafter devise their real estates, or any part thereof, to their executors to be sold, or have authorized and directed, or may hereafter authorize and direct such executors to sell and convey such real estates, or have directed or may hereafter direct such real estates to be sold, without naming or declaring who shall sell the same, if one or more

of such executors is, or are since dead, or shall hereafter die, it shall and may be lawful for the surviving executor or executors, to bring actions for the recovery of possession thereof, and against trespassers thereon, to sell and convey such real estates, or manage the same for the benefit of the persons interested therein, as fully and completely as he, she or they, together with his, her or their co-executor or co-executors, would be empowered to do if he, she or they were still living. (Act March 12, 1800, §1, 3 Sm., 433.)

§ 4684 When Acting Executor May Sell and Manage Real Estate, etc.

In all those cases wherein such devises have been or shall be made, or such authority or direction given, if one or more of such executors hath or have refused, or shall hereafter refuse or hath or have renounced or shall renounce, it shall and may be lawful for the acting executor or executors to sell and convey such real estates, and otherwise act respecting the same, as fully and completely as he, she or they, together with such refusing or renouncing executor or executors, would be empowered to do, if he, she or they had not refused or renounced. (Act March 12, 1800, §2, 3 Sm., 433.)

§ 4685 When Administrator c. t. a. May Sell Realty and Act as to the Same.

If, where such devises as aforesaid have been or shall be made, or authorities and directions given, such executor or executors are deceased, or shall hereafter die, or have refused or shall hereafter refuse, or have renounced or shall renounce, and letters of administration with the will annexed have been or shall be granted, it shall and may be lawful for such administrators with the will annexed, to sell and convey such real estates, and otherwise act, respecting the same, as fully and completely as if such deceased, refusing or renouncing executor or executors, might or could have done, were he, she or they still living, or had he, she or they accepted the execution of the last wills and testaments of such testators, or had not renounced. (Act March 12, 1800, §3, 3 Sm., 433.)

§ 4686 When Administrators and Remaining Executors May Sell Realty, Execute Trusts of Will, etc.

If, where such devises as aforesaid have been made or shall be made, or authorities and directions given, such executor or executors shall have been or hereafter may be dismissed or otherwise discharged, the executor or executors remaining, shall have like power to sell and to execute the said trusts and authorities, as fully and amply as if all the executors named had joined therein; or if all the executors have been or hereafter shall be dismissed, or the letters testamentary have been or shall be in any case vacated, and new letters awarded, it shall and may be lawful for the administrators with the will annexed, or the administrator *de bonis non*, or other person or persons to whom letters of administration shall legally issue, to sell and to execute the said powers and authorities mentioned and contained in any last will and testament, as fully and amply as if all the executors named had joined therein. (Act March 12, 1800, §4, 3 Sm., 433.)

Nothing in this act shall be deemed or taken to prevent any testator from directing, by his or her last will and testament, otherwise than is herein declared and enacted. (Act March 12, 1800, §5, 3 Sm., 433.)

§ 4687 All Powers, etc., as to Realty in Any Will Not Given to Any Person Shall be Exercised by Executors Under Direction of Orphans' Court.

All powers, authorities and directions, relating to real estate, contained in any last will and not given to any person by name or by description, shall be deemed to have been given to the executors thereof; but no such power, authority or direction shall be exercised or carried into effect by them, except under the control and direction of the Orphans' Court having jurisdiction of their accounts. (Act February 24, 1834, §12, P. L., 73.)

§ 4688 A Naked Authority to Executors to Sell Real Estate Shall Give Power to Sell, and Remedy by Entry as if the Land Had Been Devised to Them to be Sold, Saving Testator's Right to Direct Otherwise.

The executors of the last will of any decedent, to whom is given thereby a naked authority only to sell any real estate, shall take and hold the same interests therein, and have the same power and authorities over such estate, for all purposes of sale and conveyance, and also of remedy by entry, by action or otherwise, as if the same had been thereby devised to them to be sold, saving always, to every testator, his right to direct otherwise. (Act February 24, 1834, §13, P. L., 73.)

§ 4689 Power of Surviving Executor and of Acting Executor Over Realty, etc.

The survivor or survivors of several executors of any last will containing a devise of real estate to such executors for the purpose of sale or otherwise, or a power or naked authority only to them to sell the same as aforesaid; also, the acting executor or executors of any such will, where one or more of them resign, refuse or renounce the trust, or are discharged or dismissed therefrom, shall have the same interest in and power over such estate for all purposes of sale, conveyance and remedy as aforesaid as all the executors might have or exercise for the like purposes, saving always to every testator his right to direct otherwise. (Act February 24, 1834, §14, P. L., 73.)

This statute acted upon in *Trust Co.* vs. *Lippincott*, 106 Pa. St., 295 (1884).

§ 4690 Powers and Liabilities of Administrators c. t. a.

All and singular the provisions of this act relative to the powers, duties and liabilities of executors are hereby extended to administrators with a will annexed. (Act February 24, 1834, §67, P. L., 73.)

§ 4691 Acts of Administrator in Good Faith Not to be Impeached by Establishment of a Will.

All such acts of administration as would be in due course of law, in case of intestacy, if done in good faith and without notice of a will, shall not be impeached, though a will should afterwards be discovered and established. (*Ibid*, §68.)

§ 4692 When an Executor or Administrator of a Deceased Creditor Can Sustain Ejectment for Purchase Money.

In all actions of ejectment now pending, or which may hereafter be brought, when the object is to enforce the payment of purchase money due and owing on land contracts, it shall and may be lawful for the executors or administrators of the deceased creditor, to sustain the same in their own names, to the same extent and in like manner as the testator or intestate, if living, could. (Act April 9, 1849, §5, P. L., 526.)

§ 4693 Executor or Trustee With Power to Convey, May do so by Attorney, but no Trustee Shall Delegate the Discretion for General Management of Estate.

Any trustee, executor or other person acting in a fiduciary character, with power to convey lands or tenements in Pennsylvania, may make conveyance under such power by and through an attorney or attorneys duly constituted, and such conveyance shall be of the same validity as if executed personally by the constituent; and all conveyances so heretofore *bona fide* made by such trustees are hereby confirmed: *Provided*, That nothing herein contained shall authorize any person so acting in a fiduciary character, to delegate to others the discretion vested in himself for the general management of his trust. (Act March 14, 1850, §1, P. L., 195.)

§ 4694 When Testator Directs Real Estate to be Appraised and Sold, or Devises it to Any Persons at an Appraisement, and Has Not Directed How Appraisement is to be Made, Any Party in Interest May Apply to Orphans' Court.

In all cases of wills heretofore made and duly proved and recorded, and in all cases of wills hereafter to be made, wherein the testator directs all or any part of his real estate to be appraised and sold, or where such real estate is devised to any person or persons at an appraisement to be made, or when the right is given to one or more persons to take such real estate at any appraisement directed by the testator to be made, in all such cases, when the testator has not or shall not indicate by whom such appraisement shall be made, it shall be lawful for any of the parties interested in the real estate directed to be appraised to apply by petition to the Orphans' Court of the county in which such real estate is situated, setting forth the terms and character of such devise or direction of the testator, and also the name and residence, when known, of all the parties interested in the real estate directed to be appraised. (Act April 17, 1869, §1, P. L., 72.)

§ 4695 On Presentation of Petition, Orphans' Court May Appoint Three Appraisers, Unless the Will Designates a Different Number—Inquest to Sheriff—Notice to all Parties as in Partition, etc.

Upon the presentation of such petition, the Orphans' Court of the proper county shall appoint three disinterested and judicious persons, citizens of the county, to make such an appraisement, unless where the testator has designated the number of persons to make such an appraisement, and in such cases the Orphans' Court shall appoint the number of persons so designated, and award an inquest directed to the Sheriff of the proper county, for the purpose of having such appraisement made; and shall order and direct notice to be given to all parties interested of the time and place of making such appraisement, in the same manner that notice is required to be given in proceedings in partition in the Orphans' Court on estates of decedents. (Act April 17, 1869, §2, P. L., 72.)

§ 4696 Appraisement to be Returned, Confirmed, and Shall be Conclusive Unless Appeal Entered Within Three Months.

The appraisement so made shall be returned to and be confirmed by the said Orphans' Court; and the proceedings thereon shall be entered on record, and shall be conclusive on all the parties interested in said real estate, unless an appeal therefrom to the Supreme Court shall be taken within three months thereafter. (Act April 17, 1869, §3, P. L., 72.)

§ 4697 On Confirmation of Appraisement, Estate to be Adjudged as Directed by Will—If all Neglect to Take, then it Shall be Disposed of as Provided by the Will.

Upon the return and confirmation of such appraisement, the court shall adjudge such real estate to the person or persons entitled to take the same, on compliance with the terms of the will; and if all of the parties entitled to take the same under the provisions of the will, neglect to appear in court during the first week of the term to which the inquest is returnable, to accept the same, then a record thereof shall be made and such real estate shall then be disposed of as the testator may have directed, in the event of such real estate not being taken at the appraisement directed by him. (Act April 17, 1869, §4, P. L., 72.)

§ 4698 Oath of the Appraisers of Real Estate Under Foregoing Sections.

The appraisers shall be duly qualified by the Sheriff (to) well and truly, and without prejudice or partiality, to value and appraise such real estate. (Act April 17, 1869, §5, P. L., 72.)

§ 4699 Fees of Sheriff and Appraisers Under Foregoing Sections.

The Sheriff and appraisers shall receive the same fees as are now allowed by law in cases of partition of decedents' (estates) in the Orphans' Court. (*Ibid*, §6.)

III. Where there is a Ground-Rent, or a Mortgage, or Judgment.

The proceedings in such cases will be found sketched in Chapters V, VI and VIII, BREWS. Prac., Vol. I.

IV. Where the Personalty is Insufficient for the Payment of Debts,

and

V. Where the Interests of Minors or Cestuis Que Trustent Will be Promoted.

The Orphans' Court which possesses jurisdiction of the accounts of an executor, administrator or guardian, shall have power to authorize a sale or mortgage of real estate by such executor, administrator or guardian, in the following cases, viz.:

I. On the application of the executor or administrator, setting forth that the personal estate of the decedent is insufficient for the payment of debts and maintenance and education of his minor children, or for the purpose of paying the debts alone.

II. On the application of such executor or administrator, or for any person interested, setting forth that on the final settlement of the administration account, it appears that there are not sufficient personal assets to pay the balance appearing to be due from the estate of such decedent, either to the accountant or others.

III. On the application of a guardian, setting forth that the personal estate of the minor is insufficient for his maintenance and education, or for the improvement and repair of the other parts of his real estate, or that the estate of said minor is in such a state of dilapidation and decay, or so unproductive and expensive, that it would be to the interest and benefit of said minor, in the judgment of said court, that the said estate should be sold; and the Orphans' Court of the county wherein any such real estate may be situate, shall have the same authority to direct a sale in this latter case as in the cases particularly mentioned in the thirty-second section of this act. (Act March 29, 1832, §31, P. L., 198)

§ 4700 Proceedings Where the Real Estate Lies in the Same or in Different Counties.

When the real estate, with respect to which application shall be made to the Orphans' Court in the cases mentioned in the preceding section is situated in the same county, the said court may order the sale or mortgage of such part or so much of such real estate as to them shall appear necessary. When the real estate is situated in another county or counties, or in the same or another county or counties, and the Orphans' Court which possesses jurisdiction over the accounts of such executor, administrator, or guardian, shall be satisfied of the propriety of a sale or mortgage of some portion of such real estate not within their jurisdiction, it shall be lawful for such court to make a decree authorizing such executor, administrator, or guardian, to raise so much money as the said court may think necessary from real estate situated in such county or counties as they may designate; and thereupon it shall be the duty of the Orphans' Court of the county wherein the real estate so designated is situated, upon the petition of such executor, administrator, or guardian, to make an order for the sale or mortgage, as they shall think expedient, of so much and such parts of such real estate as shall, in their opinion, be necessary to raise the specified sum; and such executor, administrator, or guardian, shall in all cases make return of his proceedings in relation to such sale or mortgage to the Orphans' Court of the county in which the real estate so sold or mortgaged lies, when, if the same be approved by the court, it shall be confirmed. (Act March 29, 1832, §32, P. L., 198.)

§ 4701 Court May Refer Applications for Sale or Mortgage to a Master.

In all cases where an application shall be made to any Orphans' Court, for a decree authorizing the sale or mortgage of real estate, under any of the provisions contained in this act, the court may appoint suitable persons to investigate the facts of the case, and to report upon the expediency of granting the application, and the amount to be raised by such sale or mortgage; and upon such report being made, the court may decree accordingly. (Act March 29, 1832, §34, P. L., 198.)

§ 4702 When Personal Estate Insufficient, Real Estate May be Sold for Payment of Debts.

Whenever it shall satisfactorily appear to the executor or administrator that the personal estate of the decedent is insufficient to pay all just debts and the expenses of the administration, he shall proceed, without delay, in the manner provided by law, to sell, under the direction of the Orphans' Court having jurisdiction of his accounts, so much of the real estate as shall be necessary to supply the deficiency; and such real estate so sold shall not be liable in the hands of the purchaser for the debts of the decedent. (Act Feb. 24, 1834, §20, P. L., 76.)

§ 4703 Before Sale or Mortgage of Real Estate, Inventory and Bond to be Filed.

No authority for the sale or mortgage of real estate, lying in the same or another county or counties, shall be granted until the executor, administrator or guardian, as the case may be, shall have exhibited to the said court a true and perfect inventory and conscionable appraisement of all the personal estate whatsoever of the decedent or minor, as the case may be, together with a full and correct statement of all the real estate of such decedent or minor, wherever situated, which has come to his knowledge; and also, in the case of an executor or administrator, a just and true account, upon oath or affirmation, of all the debts of the decedent which have come to his knowledge; nor in any case shall such authority be granted, until such executor, administrator or guardian shall have filed in the office of the Clerk of the said court a bond, with sufficient security, to be approved of by the court, conditioned for the faithful appropriation of the proceeds of such sale or mortgage, according to their respective duties: *And provided, further,* That no real estate contained in any marriage settlement shall, by virtue of this act, be sold or disposed of contrary to the form and effect of such settlement; and that the mansion-house, or most profitable part of the estate, shall be reserved to the last. (Act March 29, 1832, §33, P. L., 198.)

§ 4704 Rules of the Orphans' Court of Philadelphia.

Petitions for the sale or mortgage of real estate of a decedent for the payment of debts, shall set forth the date of his death, the name of his personal representative, and of the persons interested in his estate, under his will or under the intestate laws, as the case may be, stating such as are married women, minors or lunatics, with the names of husbands, guardians or committees. Such petition shall also set forth a description of all real estate of which the decedent died seised, a copy of the inventory of personal property filed in the Register's office, and a list of the debts of the decedent, and shall be accompanied by a certificate from the Board of Revision of Taxes, of the official valuation of the real estate proposed to be sold.

Petitions for the sale of real estate in other cases, shall set forth all necessary facts, with names of parties in interest, etc., etc., as in preceding section, and shall be accompanied by the certificate of the Board of Revision of the valuation of the real estate asked to be sold, and by affidavits of competent persons acquainted with the value of real estate in the particular locality. Where the value of the interest asked to be sold exceeds one thousand dollars, the petition may be referred by the court to a competent person to examine it, and report upon the propriety of granting the same.

There Must be a Petition, etc.

Proceedings to mortgage real estate for the payment of debts should be by petition, answer and replication. *Steffy's Appeal*, 76 Pa. St., 94 (1874).

§ 4705 By Act of 1811, Sales for Payment of Debts Were to be Held After Final Settlement of Administration Account.

And whereas, it frequently happens that on the final settlement of the accounts of the estates of testates and intestates the personal assets are found to be deficient and the balance is decreed to be and remain chargeable on the real estate of the testator or intestate.

Be it further enacted, that from and after the passing of this act, in all cases after the final settlement of any administration account in the Orphans' Court, if it shall appear that there are not

sufficient assets to pay and satisfy the balance appearing to be due, and owing from the estate of the deceased, it shall be lawful for the said court on the application of the executors or administrators, or any others interested therein, to make an order that so much of the real estate of which the deceased was seized or possessed at the time of his decease shall be sold by the executors or administrators as in the judgment of the court shall be sufficient to satisfy such balance; and the said court shall likewise decree in such cases what contribution shall be made by the heirs or devisees respectively towards the payment of any debts chargeable on the real estate of any testator, either generally in the first instance, or where the land decreed to be sold shall have been in any manner devised to any heir or devisee after any such sale being made; and all such sales shall be had, made, and conducted as in other cases of sales made under the decree of the Orphans' Court by the existing laws. (Act April 1, 1811, §2; Bioren's Acts, 1810–1811, p. 199.)

When Application May be Made—When There Are no Funds, Costs Must be Advanced.

Application may be made by the administrator at any time subsequent to the decedent's death. *Winpenny's Estate*, 40 Leg. Int., 6 (1883).

Where the administrator has no funds to pay expenses he need not apply for the order to sell unless the costs be advanced by creditors. *Kitchenman's Estate*, 11 W. N., 356 (1882).

When Interest Stops.

Interest on the debts stops from the return day of the order. *Ramsey's Appeal*, 4 Watts, 71 (1835).

When Rent Goes to Heirs.

Rent accruing after final confirmation and before execution of the deed, goes to the heirs and not to the purchaser. *Strange* vs. *Austin*, 134 Pa. St., 96 (1890).

When Burial Lot Can be Sold.

An abandoned empty burial lot may be sold. *Johnson's Estate*, 20 W. N., 16 (1887).

Purchaser's Title Cannot be Attacked Collaterally.

Under the Act of April 1, 1811, the Orphans' Court had no authority to order a sale of real estate for payment of debts, before final settlement of the accounts of the administrator or executor. But where such sale was made and confirmed, it was held that the purchaser had a good title which could not be attacked collaterally. *Snyder* vs. *Markel*, 8 Watts, 416 (1839).

The act was literally construed in *Rhoads' Estate*, 3 Rawle, 420 (1832).

§ 4706 Requirements of Petition to Sell for Payment of Debts.

The administrator should exhibit an inventory and conscionable appraisement of the personal estate when application is made for sale of real estate for payment of debts. The personalty need not be exhausted. *Walker's Appeal*, 1 Grant, 431 (1857).

It was decided in *Stiver's Appeal*, 56 Pa. St., 9 (1867), that the list of debts need not be filed if it be shown to the court. That this was done will be presumed after the order to sell has been granted. The better practice, however, is to attach such list to the petition.

The petition to sell at public sale should include all the real estate of which the decedent died seised. *Eddy's Estate*, 5 W. N., 568 (1878).

§ 4707 Form of Petition to Sell Real Estate Where Personal Property Insufficient to Pay Debts.

IN THE ORPHANS' COURT FOR THE CITY AND COUNTY OF PHILADELPHIA.

In the matter of the estate of E. E. M., deceased.

April term, 1890. No. 474.

To the Honorable, the Judges of the said Court:

The petition of J. O. respectfully represents:

I. That he is the executor of the last will and testament of the said E. E. M., deceased.

II. That the said E. E. M. died on or about the second day of May, 1889, seised in her demesne as of fee, of, in and to the following described real estate:

(Describe all the real estate.)

III. That on the final settlement of the account of your petitioner as executor of said estate, it appears that there are not sufficient personal assets to pay the balance appearing to be due from the estate of said decedent to the creditors of the said estate.

IV. That your petitioner attaches hereto as "Exhibit A" true and perfect inventory and conscionable appraisement of all the personal estate whatsoever of said decedent.

V. That the real estate of said decedent, as above exhibited to your honorable court, is a full and correct statement of all the real estate of said decedent, wherever situate, which has come to the knowledge of your petitioner.

VI. That your petitioner attaches hereto as "Exhibit B" just and true account of all the debts of said decedent which have come to the knowledge of your petitioner.

Wherefore your petitioner prays your honorable court to authorize your petitioner to sell said real estate for the payment of debts of the said decedent.

And your petitioner will ever pray, etc.

(Affidavit.)

(Attach "Schedules A. and B," as above referred to, and certificate of the Board of Revision of Taxes as to assessed valuation of the property to be sold.)

DECREE.

And now, , 1890, upon consideration of the foregoing petition and on motion of , *pro* petitioner,

It is ordered and decreed that the prayer of said petition be granted and that the petitioner be authorized to sell at public sale the real estate described in said petition, for the payment of the debts of the said E. E. M., deceased. Notice of said sale to be given as provided by Act of Assembly and the rule of court. The petitioner to make return to the court for its approval and confirmation.

§ 4708 When Debts Disputed, Proof Required.

Where judgment is confessed by the administrator, the validity of which is disputed by the heirs, an issue will be awarded before an order of sale is granted. *Dean's Appeal*, 87 Pa. St., 24 (1878).

Guardians of minor heirs have a right to be heard in opposition to an order of sale for payment of debts which are disputed. *Clark's Estate*, 46 Leg. Int., 445 (1889).

An administrator who seeks to sell for debts owing himself must prove that his claims are *bona fide*. *Eddy's Estate*, 35 Leg. Int., 234 (1878).

The Register of Wills filed a petition to sell land for the payment of collateral inheritance tax. The answer denied the facts set out in the petition. The matter was referred to a master to take testimony. *Cram's Estate*, 25 W. N., 250 (1890).

§ 4709 When Sale or Mortgage for Payment of Debts Will be Granted.

The order may be made if any claim be a lien upon the real estate. *Demmy's Appeal*, 43 Pa. St., 155 (1862).

Administration expenses will warrant a sale, though more than five years have elapsed since the testator's death. Such expenses are not a debt of the decedent. *Cobaugh's Appeal*, 24 Pa. St., 143 (1854); *Johnson's Estate*, 4 W. N., 76 (1877); *Bowker's Estate*, 6 W. N., 254 (1878).

A mortgage may be ordered for the purpose of paying a prior mortgage and other indebtedness which together exceed the personalty. *Laughlin's Estate*, 23 W. N., 544 (1888).

Where there was a judgment against the decedent and a levy thereunder upon the land of the heir, proceedings were stayed and the administrator was directed to apply to the Orphans' Court to sell for payment of debts. *Fowler* vs. *Fuller*, 8 W. N., 146 (1880).

Though proceedings at law be pending for the foreclosure of a mortgage upon the land, the Orphans' Court may order such land to be sold for payment of debts. *Fitzimmon's Appeal*, 40 Pa. St., 422 (1861).

Previous settlement of an administration account is not necessary in order to obtain an order of sale for payment of debts. Nor need notice of the application be given to the widow and heirs. They may be heard upon the question of confirming the sale. *Weaver's Appeal*, 19 Pa. St., 416 (1852); *Wall's Appeal*, 31 Id., 62 (1857).

It was also held in *Stiver's Appeal*, 56 Pa. St., 9 (1867), that it was not necessary to notify the widow.

In *Bickle* vs. *Young*, 3 S. & R., 234 (1817), a sale for payment of debts was ordered on petition of one of several administrators.

A creditor may obtain the order. *Shisler's Estate*, 4 W. N., 156 (1877). But the administration account

must first be settled. *Freno's Estate*, 1 W. N., 270 (1878).

Where the personalty, exclusive of certain bonds payable to the decedent at distant periods, was insufficient to pay debts, a mortgage was ordered. *Steffy's Appeal*, 76 Pa. St., 94 (1874).

§ 4710 When Sale or Mortgage for Payment of Debts Will be Refused.

If the debts, by reason of lapse of time, have lost their lien, the order will not be granted. *Pry's Appeal*, 8 Watts, 253 (1839); or where, for the same reason, they are presumed to be paid. *Taylor's Estate*, 11 W. N., 192 (1882).

Where the administrator applied the assets to the maintenance of the family, instead of paying debts, a sale was refused. *Pry's Appeal* (*supra*). Followed in *Kelly's Estate*, 32 Leg. Int., 412 (1875).

The executor and his wife, who was the residuary legatee, having raised sufficient funds on a mortgage to pay the debts, which funds were used by the executor for his individual use, an order of sale was refused. *Kane's Estate*, 46 Leg. Int., 220 (1889).

An order will not be granted to sell land for payment of disputed or uncertain claims. *Fasig's Estate*, 1 Woodward, 213 (1864). Nor to mortgage for the same object. *Reilly's Estate*, 36 Leg. Int., 49 (1879).

Where suits upon the debts are pending at the domicile, an ancillary administrator will not be ordered to sell real estate in this State. *Robb's Estate*, 44 Leg. Int., 472 (1887).

An order cannot be obtained to sell for payment of a first mortgage. *Grace* vs. *Kinsey*, 4 W. N., 208 (1877).

Where the attaching creditor of a distributee has no interest in the estate he cannot petition for a sale. *Beeber's Appeal*, 20 W. N., 94 (1887).

A purchaser at a sale held by an executor for the payment of legacies, part of which had been advanced by such executor, takes no title. *Torrance* vs. *Torrance*, 53 Pa. St., 505 (1866).

Where the Common Pleas had ordered a sale in partition, the Orphans' Court refused an order to sell for payment of debts. *Kennedy's Estate*, 16 W. N., 528 (1885).

The heirs having entered security for payment of debts, an order of sale was rescinded. *Single's Appeal*, 3 Brews., 160 (1869).

Where the record fails to show that the court had jurisdiction, an order to mortgage under the Act of 1832 will be vacated, although the rights of innocent third parties have intervened. *Hilton's Appeal*, 9 Atlan. Rep., 434 (1887).

§4711 Refunding Bond to be Given by Distributee Upon Distribution of Proceeds of Real Estate.

Before any distribution of the proceeds of such real estate shall be made among the kindred of the decedent, the persons entitled to receive the same shall respectively give sufficient real or personal security, to be approved of by the Orphans' Court having jurisdiction, with condition that if any debt or demand shall be afterwards recovered against the estate of the decedent, or otherwise be duly made to appear, they will respectively refund the ratable part of such demand, and the cost and charges attending the recovery of the same, so far as such real estate would have been liable to such demand if it had remained unsold; but if the person or persons entitled to receive the same is or are able to give the security aforesaid, then the money shall be put at interest, as directed in the forty-first section of this act. (Act Feb. 24, 1834, §45, P. L., 81.)

§ 4712 Share of Tenant for Life to be Charged on Land in Sales Under Proceedings in Partition—When Land Sold for Payment of Debts, Life Tenant to Give Security Before Payment to Him.

Provided always, That in the case of a sale of real estate, under proceedings in partition in the Orphans' Court, the share of any tenant for life shall not be paid to him or her, but shall remain charged on such or other real estate, according to the directions of such Orphans' Court, and in the case of a sale for the payment of debts, such tenant for life shall not be entitled to receive his share of the surplusage until he shall have given such security under the direction of the Orphans' Court, as shall sufficiently provide for the interests of the persons entitled in remainder. (Act Feb. 24, 1834, §46, P. L., 81.)

§ 4713 Upon Failure to Give Refunding Bond, Money to be Put Out at Interest.

Before any person shall be entitled to receive any share in the distribution as aforesaid, he shall give sufficient real or personal security, to be approved of by the Orphans' Court having jurisdiction as aforesaid, in such sum and form as the said court shall direct, with condition that if any debt or demand shall afterwards be recovered against the estate of the decedent, or otherwise be duly made to appear, he will refund the ratable part of such debt or demand and of the costs and charges attending the recovery of the same; but if the person or persons entitled to receive the same, is or are unable to give the security aforesaid, then the money shall be put at interest, on security approved by the Orphans' Court, which interest is to be paid annually to the person entitled to it, and the money to remain at interest until the security aforesaid is given, or the Orphans' Court, on application, shall order it to be paid to the person or persons entitled to it. (Act February 24, 1834, §41; P. L., 80.)

§ 4714 In Case of Execution Against Decedent's Estate, if Personal Estate Insufficient, Execution to be Stayed Until Application Made for Sale of Real Estate.

In every case of an execution against the executors or administrators of a decedent, whether founded upon a judgment obtained against such decedent in his lifetime, or upon a judgment obtained against them in their representative character, if it shall be made to appear, to the satisfaction of the court issuing such execution, that there is reason to believe that the personal assets are insufficient to pay all just demands upon the estate, such court shall thereupon stay all proceedings upon such execution, until the executors or administrators shall have made application to the proper Orphans' Court, for the sale of the real estate of the decedent, or for the apportionment of the assets, or both, as the case may require. (Act February 24, 1834, §35, P. L., 77.)

§ 4715 In Such Case, Court May Compel Application to be Made.

It shall be competent for the court, in the cases aforesaid, on application of the plaintiff in such judgment, or of any other person interested as heir, devisee or otherwise, to order the executors or administrators to make application to the Orphans' Court for the purpose as is hereinbefore mentioned, and to enforce such order by attachment. (Act February 24, 1834, §36, P. L., 77.)

§ 4716 Sale Authorized for Payment of Debts, Though Land Lies in Different Counties.

When application shall hereafter be made to the proper Orphans' Court having jurisdiction of the accounts of any executor or administrator, for leave to sell the real estate of a decedent, or any part of the same, for payment of debts, and any part of said real estate is situated partly in each of two or more counties, by reason of a county line running through the same, the court shall have power to order and direct the sale of the interest of the decedent in the whole of said tract of land, irrespective of the county boundary line, and such sale, when confirmed by the said court, shall be as effectual to pass the title of such real estate to the pur-

chaser, as if the whole of said tract of land had been within the boundaries of the county having jurisdiction of the accounts of the executor or administrator: *Provided*, That notice of said sale as now required by law, be given in all the counties, in which the land is situated: *And provided, further*, That any mortgage, judgment, bond or other obligation taken by such executor or administrator to secure the purchase-money or any part thereof, by lien on such lands, shall be duly recorded or entered in each of the counties in which said lands lie as now required by law. (Act June 4, 1883, §1, P. L., 65.)

§ 4717 Additional Cases Where Sale of Real Estate Authorized.

The Orphans' Courts of the several counties of this Commonwealth shall have power to authorize by decree, the sale of real estate within their respective counties in the following cases, in addition to those specified in the acts to which this is supplementary:

I. Where lands and tenements, or any interest in possession, belong to a minor, and it shall appear to the Orphans' Court of the proper county that it would be to the interest of such minor that the same should be sold, in every such case, upon the application of the guardian of such minor, the said court shall authorize the said guardian to make sale of said lands or interest; and upon the confirmation of said sale, the said guardian shall receive and hold the proceeds thereof as and for the estate of said minor.

II. Where lands and tenements are held by will or otherwise for life, or *per autre vie*, by any person or persons, with remainder to any minor or minors, and it shall appear to the Orphans' Court of the proper county that it would be to the interest of such minor or minors that the same should be sold, in every such case upon the application of the tenant or tenants for life, or *per autre vie*, as the case may be, the said court shall appoint a trustee to make sale of said lands; and upon the confirmation of such sale, the said trustee shall receive and hold the proceeds thereof in trust for the parties in interest therein, and shall loan the same upon good real estate security, upon bond and mortgage, and shall pay the interest thereof, as it shall accrue, to the tenants for life, or *per*

autre vie, until the estate for life, or *per autre vie*, shall have terminated, and shall then pay over the principal sum to the person or persons entitled to such remainder.

III. Where lands and tenements are held in trust, under the provisions of any last will and testament, for any corporation or corporations, person or persons whomsoever, and it shall appear to the Orphans' Court of the proper county that it would be to the interest of the *cestuis que trust* that the same should be sold, in every such case, upon the application of the trustee or trustees holding the same, the said court shall authorize the said trustee or trustees to make sale of said land: and upon the confirmation of such sale, the said trustee or trustees shall receive and hold the proceeds therof upon such trusts as he, she or they held the said lands. (Act April 3, 1851, §1, P. L., 305.)

§ 4718 Upon Application for Sale, Day to be Fixed and Parties Notified.

In any case where an application shall be made to any Orphans' Court for decree authorizing the sale of real estate under any of the provisions hereof, the court shall appoint a day for the hearing and investigating of the facts of the case, and shall cause notice of such day and of such application to be given to all parties legally or beneficially interested in said real estate, and to the guardian of all such parties as are minors; and if such application be made by a guardian, then to the minors themselves, or to their next of kin residing in the county, if such there be, at least thirty days prior to such day of hearing; and upon the hearing of all parties who shall attend, by themselves, their guardians, next of kin, committee or trustees, as the case may be, the said court shall make such decree in the premises as the facts and circumstances shall require. (Act April 3, 1851, §2; P. L., 305.)

§ 4719 How Notice to be Given.

The notice required by the second section hereof shall be given in the manner prescribed by the fifty-second and fifty-third sections of the act to which this is supplementary. (Act April 3, 1851, §3, P. L., 305.)

§ 4720 Requisites of Petition for Sale—Guardians Ad Litem to be Appointed.

Every application for the sale of lands under any of the provisions hereof shall be in the form of a petition, and shall set forth a sufficient description of such lands, and the names of the persons interested in the same; and where any of them shall be minors, having no guardian residing within the county in which the lands lie, it shall be the duty of the court to appoint some suitable person or persons to guard the interests of said minors: *Provided*, That if such minors shall appear upon the day of hearing before mentioned, by guardian, *prochein ami*, or next of kin, such appointment shall be null and void. (Act April 3, 1851, §4, P. L., 305.)

§ 4721 Person Executing Order of Sale to Give Bond for the Faithful Appropriation of Proceeds—No Sale to be Avoided for Misapplication or for Error of Judgment.

Before any sale of lands under any of the provisions hereof, shall be confirmed by the court, the person or persons to whom the order of sale shall be granted, shall file in the office of the Clerk of said court, a bond, with two or more sureties, to be approved of by the said court, in double the amount of the proceeds of such sale, conditioned for the faithful appropriation of said proceeds; and no sale duly made and confirmed by the proper court, shall be held to be void by reason of any misapplication of the proceeds thereof, or on account of any error of judgment which the said court may have made in deciding that such sale was to the interest of the minors or *cestuis que trust* interested in the lands so sold. (Act April 3, 1851, §5, P. L., 305.)

§ 4722 No Executor or Administrator to Sell Until He Gives Bond for Faithful Application of Proceeds.

No executor or administrator shall have power to execute any order or decree of the Orphans' Court, for the sale of any real estate, for the purposes of distribution or otherwise, nor to receive the proceeds of the sale of any of the real estate of the decedent made by

authority of law, until he shall have given security, to be approved of by the Orphans' Court having jurisdiction of his accounts, for the faithful application of the proceeds of such real estate according to law. (Act February 24, 1834, §43, P. L., 81.)

§ 4723 Where Sale Made Before Expiration of Five Years, Administrators to Apply Proceeds to Payment of Debts, Unless Distributees Object.

In cases of intestacy, where the real estate of the decedent shall be sold under an order of the Orphans' Court for distribution before the expiration of five years from the death of the intestate, the administrators are authorized to apply the proceeds of such sale, whilst in their hands, to the payment of debts and claims owing by the decedent for which there may not be other assets in hand: * * * *Provided*, That if before any such payment made, the distributees of the proceeds of such real estate, their guardians or agents, shall * * * give written notice to such administrators, objecting to such payment, then and in such case this section shall not justify the same, unless such real estate were or may be otherwise legally liable to such payment. (Act July 16, 1842, §52, P. L., 388.)

See the Act of June 8, 1893, P. L., 392.

§ 4724 Title of Purchaser at Orphans' Court Sale Not to be Affected by Subsequent Revocation of Letters—May Obtain Possession in Same Manner as Purchasers at Sheriff's Sale.

In all cases of *bona fide* sales under the order of and confirmed by the Orphans' Court, the title of the purchaser shall not be affected by the subsequent revocation of the letters testamentary or of administration of the executor or administrator making such sales. And purchasers of real estate sold under orders of the Orphans' Court shall, after the confirmation of the sale and the execution and acknowledgment of the deed, have a right to proceed to obtain possession of the purchased premises in the same manner as is now provided in relation to purchasers at Sheriff's sales. (Act April 9, 1849, §16, P. L., 527.)

§ 4725 When Real Estate Sold by Executors, Proceeds to be Paid Into Court.

Whenever any sale shall be made of any real estate by any executor, or executors, in pursuance of any authority, power or direction contained in a will, or by force thereof and of this act, either for the payment of debts or of legacies, for the support of children, or for distribution of the proceeds, or other purpose, the purchaser of such estate may pay the purchase money or consideration of such sale into the Orphans' Court having jurisdiction of the accounts of such executor or executors, or, with the leave of such court, to such executor or executors, to be disposed of according to the uses and trusts contained in such will; and such payment shall be deemed valid against all persons having or who may have an interest therein. (Act February 24, 1834, §19, P. L., 81.)

§ 4726 When One or More Executors, Administrators or Guardians, Die After Sale Under Order of Court, but Before Conveyance Made, Deed to be Made by Survivor.

In all cases where a sale of the real estate of a decedent shall be made by executors or administrators, or guardians, under an order of the Orphans' Court, if one or more of such executors or administrators, or guardians, shall die or be discharged, before a conveyance is made to the purchaser, it shall and may be lawful for the surviving executor or executors, administrator or administrators, as the case may be, to execute and deliver to the purchaser a deed of conveyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale. (Act May 1, 1861, §1, P. L., 431.)

§ 4727 Prior Sales to be Perfected by Surviving Executor, Administrator, Guardian or Trustee, in Case of Death of Their Associates.

In all cases where a sale of the real estate of the decedent hath heretofore been made by executors or administrators, or guardians, under an order of the Orphans' Court, and one or more of such executors or administrators, or guardians, hath or have died, before a conveyance hath been made to the purchaser, it shall and may be

lawful for the surviving executor or executors, administrator or administrators, or guardians, as the case may be, to execute and deliver to the purchaser a deed of conveyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale. Where authority is or shall be given, by decree of court, to trustee, or other persons, to sell real estate, and any such trustees or other persons authorized, shall have died, resigned or ceased to act, before a sale is effected or a deed executed, in all such cases, sales may be effected and a deed executed by the surviving or succeeding trustee or trustees, or other persons, with as full effect, in all particulars, as if effected or executed by the persons acting in the trust, or other office, at the time a sale was originally decreed. Every deed made in pursuance of and agreeably to the provisions of this act shall vest the property therein described in the grantee, as fully and effectually as if the same had been made by all the persons who may have sold any such estate circumstanced as aforesaid. (Act May 1, 1861, §2, P. L., 431.)

§ 4728 In Case of Death or Removal of Executor, Administrator or Guardian, After Sale, the Deed to be Made by His Successor, or if Latter Fail to Enter Security, Deed to be Made by Clerk of Court.

In all cases where a sale shall be made by an executor, administrator or guardian, under an order of the Orphans' Court, and such executor, administrator or guardian shall be removed by the court, or shall die, or become insane, or otherwise incapable, before a conveyance is made to the purchaser, it shall be lawful for the succeeding administrator of the decedent, or for the successor in the guardianship, as the case may be, such succeeding administrator or guardian having given security, to be approved of by the said court, for the faithful appropriation of the proceeds of such sale, to execute and deliver to the purchaser a deed of conveyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale; but if, within three months after such sale, there shall be no such succeeding administrator or guardian having given security as aforesaid, it shall be the duty of the Orphans' Court, on petition of the purchaser, to direct the Clerk of the court to execute and deliver to the purchaser the necessary deed of

conveyance, on his full compliance with the terms and conditions of sale, paying into court the moneys payable, and delivering to the Clerk the sureties required by the said terms and conditions, which moneys and securities shall remain subject to the disposition of the court. Every deed made in pursuance of and agreeably to the provisions of this act, shall vest the property therein described in the grantee, as fully and effectually as if the same had been made by the persons who may have sold any such estate, circumstanced as aforesaid. The like proceedings may be had where an executor, administrator or guardian shall neglect or refuse to execute and deliver such deed for the space of thirty days after due notice of an order of the court requiring him to execute the same. (Act March 29, 1832, §47, P. L., 208.)

§ 4729 Public Notice of Sale to be Given.

Whenever, by the provisions of this act, it shall be lawful for the Orphans' Court to order the sale of real estate, public notice of such sale shall be given by the executor, administrator or guardian, as the case may be, at least twenty days before the day appointed therefor, by advertisement, in at least one newspaper published in the county, if there be one, or if there be none, then in an adjoining county, and in all cases, notice shall also be given by hand-bills, affixed in at least three of the most public places in the vicinity of such estate. (Act March 29, 1832, §45, P. L., 208.)

§ 4730 Lien of First Mortgage Not to be Destroyed by Orphans' Court Sale.

When the lien of a mortgage upon real estate is or shall be prior to all other liens upon the same property, except other mortgages, ground rents, purchase money due to the Commonwealth, taxes, charges, assessments and municipal claims, whose lien, though afterward accruing, has by law priority given it, the lien of such mortgage shall not be destroyed, or in anywise affected by any judicial or other sale whatsoever, whether such sale shall be made by virtue or authority of any order or decree of any Orphans' or other court, or of any writ of execution or otherwise, howsoever: *Provided*, That this section shall not apply to cases of mortgages upon unseated lands or sales of the same for taxes. (Act March 22, 1887, P. L., 7.)

This act was followed by the Act of 1893.

§ 4731 When Lien of Mortgage Preserved Against All Sales.

That when the lien of a mortgage upon real estate is, or shall be, prior to all other liens upon the same property, except other mortgages, ground rents, assessments and municipal claims, whose lien though afterwards accruing has by law (priority) given it the lien of such mortgage shall not be destroyed, or in anywise affected by any judicial or other sale whatsoever, except as hereinafter stated, whether such sale be made by virtue or authority of any order or decree of any Orphans' or other court, or of any writ of execution, or otherwise, howsoever: *Provided*, That this section shall not apply to cases of mortgages upon unseated lands or sales of the same for taxes. (Act May 19, 1893, §1, P. L., 110.)

Prior to the passage of these acts, it was held in *Thomas' Estate*, 3 W. N., 96 (1876), that a first mortgage should not be included in the schedule of debts, as it is not discharged by the sale. *Grace* vs. *Kinsey*, 4 W. N., 208 (1877), and *Association's Appeal*, *81 Pa. St., 330 (1876), were to the same effect.

§ 4732 Sale for Payment of Debts May Discharge Mortgage if Mortgagee Consent.

That whenever the application for an order or decree of the sale of real estate shall be made by an executor or administrator for the purpose of paying the debts of the decedent, it shall and may be lawful for the Orphans' Court having jurisdiction of such petition, to decree a sale of the premises freed and discharged from the lien of a mortgage, or mortgages, as mentioned in the first section of this act, if the holder or holders of such mortgage or mortgages, by writing filed in said court, shall consent to the sale being so made, that the sale should be made, freed and discharged from the lien of the mortgage or mortgages, as aforesaid. (Act May 19, 1893, §2, P. L., 110.)

The terms of sale should be fixed by the order. *Bailey's Appeal*, 32 Pa. St., 40 (1858); *Breil's Appeal*, 24 Pa., St., 511 (1855).

§ 4733 Sales Outside of Philadelphia May be Made Partly Upon Credit.

In all sales of real estate under the order of the Orphans' Court, authorized by the laws of this Commonwealth, the court decreeing the sale shall have power to direct the terms thereof, for cash, not less than one-fourth of the purchase money, at the time of the confirmation of the sale, and the balance in such instalments and at such times, as in the opinion of the court, shall be for the interest and advantage of those interested therein, requiring security, to be approved by the court, in at least double the value of the interest proposed to be sold, before such sale shall be ordered or made: *Provided*, That the purchase money shall be a lien on the premises sold, until fully paid according to the decree of the court. (Act March 22, 1859, §1, P. L., 207.)

This act does not apply to Philadelphia (Id. §2). It was construed according to its terms in *Fitzimmon's Appeal*, 40 Pa. St., 422 (1861); and where the sale was on a credit but the administrator returned that he sold for a gross sum, he was denied relief. *Davis' Appeal*, 14 Pa. St., 371 (1850).

§ 4734 Return to Order—Confirmation.

The administrator must make return to the court for its confirmation. *Morgan's Appeal*, 110 Pa. St., 271 (1885).

An objection to the execution of the mortgage may be interposed by the heir-at-law at any time before confirmation of the proceedings. (*Ibid.*)

That security was not required does not invalidate the sale after its due confirmation. *Lockhart* vs. *John*, 7 Pa. St., 137 (1847).

Any irregularity in the proceedings is cured by confirmation of the sale. *Potts* vs. *Wright*, 82 Pa. St., 498 (1876).

One who claims adversely cannot object to the confirmation of the sale. *Kline's Appeal*, 39 Pa. St., 463 (1861.)

Where the will contains a power of sale, the court will confirm a sale thereunder without a previous application to sell. *Musselman's Appeal*, 65 Pa. St., 480 (1870.)

§ 4735 Postponement of Sale—Insufficient Bids, etc.

The sale may be put off until the season be favorable. *Winpenny's Estate*, 12 W. N., 520 (1882).

When the bids are insufficient, the sale may be adjourned for not less than twenty days. *Gillespie's Estate*, 10 Watts, 300 (1840).

If there should be no bidders, the administratrix may proceed under the original order and need not obtain an alias. *Murphy's Estate*, 1 W. N., 637 (1875).

The highest bidder having refused to comply with the terms of sale, the property was returned as having been sold to the next bidder. *Stiver's Appeal*, 56 Pa. St., 9 (1867).

§ 4736 Rights of Vendor and Vendee, Between Sale and Confirmation.

Demmy's Appeal, 43 Pa. St., 155 (1862), STRONG, J.:—

"It is, perhaps, not indispensable that we should "determine whether the purchaser at such sale "becomes, before its confirmation, so fully the owner "of the property purchased that he must bear any "loss occasioned by fire or other accidents. In ordi- "nary sales by articles of agreement, the purchaser is "entitled to accretions, and must sustain any loss "caused by accidental injuries to the property between

"the time of the agreement for the purchase and the "execution of the deed. This appears to be well set- "tled. Equity regards that as done which has been "agreed to be done, and which the parties to the "agreement have in their power to do: *Richter* "vs. *Selin*, 8 S. & R., 440. Such a sale, there- "fore, works a conversion, and if the vendor by arti- "cles die before conveyance, the purchase money is "substituted for the land, and passes to the personal "representatives of the vendor, and not to his heirs "On the other hand, if the vendee die before convey- "ance, his personal representatives take nothing. The "land descends to his heirs. For authorities collected "upon this subject, references may be made to 2 "Story's Eq. Jur., p. 98, and notes. But the reasons "which apply to private executory contracts of sale, "and which have led to the establishment of the prin- "cipal that a vendee by articles is, in equity, the "owner of the land which was the subject of the con- "tract, and, as such, must run the hazard of any "deterioration in its value that may take place before "the conveyance of the perfect title, do not apply with "equal force to Orphans' Court sales for the payment "of the debts of a decedent. Such sales are not abso- "lute and unconditional. They depend for their "validity upon the approval and confirmation of the "court. They are liable to be vacated by a power "superior to the purchaser and against his will. The "sale, even after confirmation, does not divest the title "of the heirs of the decedent, for it remains in the "power of the court until a deed has been executed "and delivered. Until then, their right to maintain "ejectment, even against the purchaser, has not gone. "*Leshey* vs. *Gardner*, 3 W. & S., 314.

"Until then, no conversion takes place, and if the "heir of the decedent die, even subsequently to the "confirmation of the report of sale, but before the "deed, his interest descends as land, and not as money. "*Erb* vs. *Erb*, 9 W. & S., 147; *Bigert's Appeal*, 8 "Harris, 17.

"These cases recognize a clear distinction "between sales made under order of an Orphans' "Court and private sales. The latter are exclusively "acts of the parties, and are beyond the control of any "other power. The former are not the acts of the "decedent or his heirs or devisees. They are the "acts of the court, and they require no consent "of the owners. In substantial fact, the purchaser "buys from the court through its agent. The court "reserves the power to decline his bid, and to disan- "nul the act of its agent, until the sale has been fully "consummated. It is difficult to distinguish between "such sales and those which are made by a master in "chancery.

"In *Ex parte Minor*, 11 Vesey, 559, Lord ELDON "held that a purchase before a master is not complete "before confirmation of his report, and therefore a "loss by fire after a report of sale, but before con- "firmation, was held not to fall upon the purchaser. "The same rule was adopted in *Twigg* vs. *Fifield*, 13 "Vesey, 517, and was recognized in 1 Sugden, V. & P., "58, and in 3 D. & W., 74. It appears to be the "undoubted doctrine of courts of equity. 2 Daniel's "Ch. Prac., 1455.

"It is said that while there is an analogy between "a purchase, made under an order of the Orphans' "Court, to sell for the payment of debts, and one "made before a master in chancery, in some respects

"they are very dissimilar. It is not obvious, how-
"ever, wherein the dissimilarity consists. Both
"require confirmation; one by the express words of
"the statute, and the other by the uniform practice of
"the court. That is but a difference in form. No
"difference is seen in the responsibility of the pur-
"chasers. It is as fixed in the one case as in the
"other. Each purchaser may move for confirmation.
"Such sales would seem to be much more alike than
"are Orphans' Court sales and Sheriff's sales in a court
"of law. The purchaser at a Sheriff's sale has been
"held to acquire an inceptive title, commencing at
"the time when the property was struck down to him,
"an interest that may be bound by the lien of a judg-
"ment. *Bellas* vs. *McCarty*, 10 Watts, 21; *Morrison*
"vs. *Wurtz*, 7 Watts, 437; *Stephens' Appeal*, 8 W. &
"S., 188. This, however, only in cases where the
"Sheriff's deed had been acknowledged and delivered.
"There the deed relates back to the bid and its
"acceptance by the Sheriff. Even in a Sheriff's sale,
"the title of the debtor is not divested, nor can the
"purchaser maintain ejectment or grant a lease of the
"lands, until the deed has been acknowledged and
"delivered. *Hall* vs. *Benner*, 1 Penna. Rep., 402.
"But there are essential differences between an
"Orphans' Court sale and a Sheriff's sale. The one
"is made by the owner, through the agency of the
"officer of the law, the other is made by the court,
"without any agency, express or implied, of the
"owner. In the one case, the court has the property
"in charge, supervises the sale, and may direct that it
"be made on credit; in the other, the court reviews
"the sale only indirectly, in virtue of its control over
"its officer and process, and the sale must be for cash.

"In the one case, therefore, equity might presume "that the purchase money was paid when the Sheriff "accepted the purchaser's bid, in the other no such "presumption can arise. There seems to be, then, but "a very remote analogy, if any, between the rights of "a purchaser under a Sheriff's sale, and those under "a sale made in the Orphans' Court for the payment "of debts."

"It must be admitted, however, that there are "remarks in the opinion of Judge ROGERS, delivered in "*Robb* vs. *Mann*, 1 Jones, 300, which assert strongly "that a purchaser at an Orphans' Court sale is, in "contemplation of equity, the owner of the land pur- "chased from the time of the auction and before its "confirmation. Yet to me the remarks of the Judge "seem to be outside of the case. It was a suit brought "by the administrator against the purchaser for the "purchase money. The sale had been confirmed and "the purchaser had taken possession. Deterioration "of the value of the land, of course, could not avail "as a defence against the administrator, whether the "purchaser had title before the confirmation of the sale "or not."

Greenough vs. *Small*, 47 Leg. Int., 454 (1890): One who purchases land sold for payment of debts cannot, before confirmation of the sale, defend the possession of the land against the heir's grantee.

Orphans' Court sales are entirely within the control of that court up to and even after confirmation. *DeHaven's Appeal*, 106 Pa. St., 612 (1884).

§ 4737 Setting Aside Orphans' Court Sales.

Puffing, secret bidding, misrepresentation, misdescription, unauthorized assertions and promises, inade-

quacy of price, fraud, etc. See *Schug's Appeal*, 14 W. N., 49 (1883); *DeHaven's Appeal*, 106 Pa. St., 612 (1884); *Wiltberger's Estate*, 20 W. N., 299 (1887); *Johnson's Appeal*, 114 Pa. St., 132 (1886); *Moore's Estate*, 13 W. N., 145 (1883); *Murphy's Estate*, 11 W. N., 419 (1882); *Cronrath's Estate*, 1 Woodward, 103 (1863); *Ringler's Estate*, Id., 214 (1864); *Hannum's Appeal*, 2 Penny., 103 (1882); *Haslage's Appeal*, 37 Pa. St., 440 (1860).

"After a sale made under an order of the "Orphans' Court, and a final confirmation of it accord-"ing to the rules of court, followed by the payment of "the purchase money and the delivery of the deed, it "is too late to make objections to the sale. This is "the general rule."—LEWIS, J. *Simmond's Estate*, 19 Pa. St., 439 (1852).

In a case of gross mistake, the rights of third parties not being affected, the Orphans' Court may vacate a private sale by a guardian under an order of court, even after confirmation of the sale, payment of the purchase money and execution and delivery of the deed. *Johnson's Appeal*, 114 Pa. St., 132 (1886).

The sale of land subject to encumbrances will be set aside at the cost of the administrator, unless he so notify bidders. *Schwartz's Estate*, 35 Leg. Int., 153 (1878).

In *Crosson's Appeal*, 125 Pa. St., 380 (1889), real estate sold for payment of debts was subject to fixed liens, the amounts whereof could not be ascertained at the time of sale. The land was sold as though no incumbrances existed, the purchaser being credited with their amounts when ascertained.

Cascaden vs. *Cascaden*, 140 Pa. St., 140 (1891): A bill to set aside a private sale under a testamentary

power, on the ground of fraud, must aver that the purchaser was a party to the fraud.

In *Grindrod's Estate*, 140 Pa. St., 161 (1891), the court refused to set aside a sale after the lapse of ten years, upon petition of a party averring that he was a minor at the time of sale, was interested in the land, and had no notice of the proceedings, but not alleging fraud.

No appeal lies from the order of the Orphans' Court which opens the decree confirming a sale of real estate, sets aside the sale and modifies the order. These are matters of discretion. *Williams' Estate*, 140 Pa. St., 187 (1891).

The purchaser's expenses should be ordered paid, if the sale be set aside. *Scott's Estate*, 4 Phila., 178 (1860).

§ 4738 Conclusiveness of Decree.

Any irregularity in procuring a decree of the Orphans' Court for the mortgaging of a decedent's estate must be amended in that court or upon an appeal to the Supreme Court. Such mortgage cannot be attacked in a collateral proceeding. *Morgan's Appeal*, 110 Pa. St., 271 (1885).

§ 4739 Discharge of Liens.

The widow's claim for dower is discharged under a sale for payment of debts, in pursuance of a power contained in the will. *Mitchell* vs. *Mitchell*, 8 Pa. St., 126 (1848).

Her dower remains charged on the land when the latter is expressly sold as subject to it. She is not, in such case, interested in the proceeds of the sale. *Zook's Appeal*, 54 Pa. St., 486 (1867).

A portion of real estate was sold under a power in the will; the proceeds were not applied to a judgment against the decedent. *Held*, that the sale had not discharged the lien of the judgment as to other land of the decedent in possession of devisees. *Konigmaker* vs. *Brown*, 14 Pa. St., 269 (1850).

§ 4740 Distribution of Surplus—Bill to Compel Conveyance of Title—Second Order—Appeal.

Any surplus received from a sale for payment of debts should be distributed as real estate. *Diller* vs. *Young*, 2 Yeates, 261 (1797); *Wale's Estate*, 33 Leg. Int., 409 (1876).

Where there was a judgment against the decedent in his lifetime and the land was sold more than five years after his death, the heirs were held to be entitled to the surplus as against other creditors. *Bindley's Appeal*, 69 Pa. St., 295 (1871).

A bill to compel the holder of the title to convey to the purchaser of land sold for payment of debts, should be filed by the administrator. *Ulrich's Appeal*, 2 Penny., 455 (1882).

A second order of sale, if made only for the maintenance of minor children, is valid. *Huckle* vs. *Phillips*, 2 S. & R., 4 (1815).

No appeal lies from a decree granting an order of sale for payment of debts. It is not a definitive decree. *Snodgrass' Appeal*, 96 Pa. St., 420 (1880).

§ 4741 Where the Real Estate is Valued at Not More than One Thousand Dollars, it May be Sold and the Proceeds Distributed.

Whenever any person shall die seised of real estate valued at not more than one thousand dollars, and the parties in interest desire the same to be converted into money for distribution, it shall be lawful for the Orphans' Court of the proper county, in its discre-

tion, upon the joint petition of the widow and heirs, and the guardians or committees of such as are minors or under disabilities, in whom the real estate of the decedent shall have vested, setting forth the description of the property, the desire to have the same sold, and its estimated value, duly sworn, together with the affidavit of two disinterested persons, stating that the real estate is not worth more than one thousand dollars, to order the executor, administrator or a trustee to make sale and proceed in all respects in the manner now provided by existing laws, in cases of the sale of real estate for the payment of debts of a decedent; and the proceeds of such sale, after the payment of the expenses thereof, shall be distributed to and among those entitled thereto, the same as real estate. (Act May 15, 1874, §1, P. L., 166.)

Following is the rule of court of Philadelphia upon this subject:—

Application under Act of May 14, 1874, for the sale of decedent's real estate, shall be upon joint petition of the widow and heirs, and the guardians or committees of such as are minors, or under disabilities, in whom the real estate shall have vested, setting forth the description of the property, the desire to have the same sold, and its estimated value duly sworn to, together with the affidavit of two disinterested persons familiar with the value of real estate in the locality, that the real estate proposed to be sold is not worth more than one thousand ($1,000) dollars, accompanied with a certificate from the Board of Revision of the valuation thereof, and the executor, administrator or trustee appointed for the purpose, shall make sale, and proceed in all respects as now required for the advertisement, return and confirmation, and accounting for the proceeds of sale and distribution in cases of sales of real estate for the payment of debts of a decedent.

§ 4742 Real Estate, Upon Petition of Parties in Interest, May be Converted Into Cash and the Proceeds Distributed as Real Estate.

That whenever any person shall die seised of real estate and the parties in interest desire the same to be converted into money for distribution, it shall be lawful for the Orphans' Court of the proper county, in its discretion, upon the joint petition of the widow and

heirs and the guardians or committees of such as are minors or under disabilities, in whom the real estate of the decedent shall have vested by descent or will, setting forth the description of the property, the desire to have the same sold, to order the executor, administrator or a trustee to make sale after he shall have given bond, with one or more sureties in double the appraised value of the real estate, to be approved by the court, and proceed thereafter in all respects in the manner now provided by existing laws in cases of the sale of real estate under proceedings in partition and the proceeds of such sale after the payment of the expenses thereof, shall be distributed to and among those entitled thereto, the same as real estate: *Provided*, That such sale shall have the same effect in all respects as a public sale in proceedings in partition of real estate under existing laws. (Act June 12, 1893, P. L., 461.)

§ 4743 Lien Creditor Purchasing, May Give His Receipt in Lieu of Purchase Money.

Whenever the purchaser or purchasers of real estate at Orphans' Court or Sheriff's sale, shall appear from the proper record to be entitled, as a lien-creditor, to receive the whole or any portion of the proceeds of said sale, it shall be the duty of the Sheriff, administrator, executor or other person making such sale, to receive the receipt of such purchaser or purchasers for the amount which he or they would appear, from the record as aforesaid, to be entitled to receive: *Provided*, That this section shall not be so construed as to prevent the right of said Sheriff, administrator, executor or other person aforesaid, to demand and receive, at the time of sale, a sum sufficient to cover all legal costs entitled to be paid out of the proceeds of said sale: *And provided, further*, That before any purchaser or purchasers shall receive the benefit of this section, he or they shall produce to the Sheriff, or other person so making said sale, a duly certified statement from the proper records, under the hand and official seal of the proper officer, showing that he is a lien-creditor, entitled to receive any part of the proceeds of the sale as aforesaid. (Act April 20, 1846, §1, P. L., 411.)

§ 4744 In Preceding Case, Special Return to be Made—Lien may be Attacked and Issue Awarded to Test Validity of Same.

It shall be the duty of the said Sheriff, executor, administrator or other person making sale as aforesaid, in all cases when he or they shall receive the receipt of the purchaser as aforesaid, to state the fact in the return of the proceedings of said sale, and attach thereto a list of the liens upon the property sold, which said return shall be read in open court, on some day during the term, to be fixed by the order of court; and if the right of said purchaser or purchasers to the money mentioned in said return shall be questioned or disputed by any person interested, the court shall thereupon appoint an auditor, who, after due notice given to the persons interested, in such manner as the court may direct, shall make a report, distributing the proceeds of such sale, with the facts and reasons upon which such distribution is made, to be approved by the court; or to direct an issue to determine the validity of said lien, and all further proceedings shall be stayed until the said issue shall be decided. And in case it shall be determined that the said purchaser or purchasers were not entitled to receive said money, it shall be the duty of the proper court to set aside the sale, and direct the real estate to be resold, unless the money is paid to the Sheriff or other person making the sale, within ten days thereafter: *Provided*, That nothing in this act shall be so construed as to prevent the purchaser or purchasers, in case the said real estate, upon the second or subsequent sale, does not bring a sum equal to the amount bid by him or them, from being liable for such deficiency: *Provided*, That before an issue shall be directed upon the distribution of money arising from sales under execution, or Orphans' Court sales, the applicant for such issue shall make affidavit that there are material facts in dispute therein, and shall set forth the nature and character thereof; upon which affidavit the court shall determine whether such issue shall be granted, subject to a writ of error or appeal by such applicant, if the issue be refused, in like manner as in other cases in which such writ now lies. (Act April 20, 1846, §2, P. L., 411.)

§ 4745 Where Issue Awarded, Fund may be Invested Pendente Lite.

Upon granting any such issue, it shall be discretionary with the court, so soon as the money arising from such sale shall have been paid into court, upon the application of the party or parties appearing, by the record, *prima facie* entitled to the said fund, to order the same to be invested, *pendente lite*, in the debt of the United States, or some other sufficient security, subject to the decree of the court. (Act April 20, 1846, §3, P. L., 411.)

§ 4746 Private Sales Authorized.

From and after the passage of this act, the Orphans' Court of the several counties of this Commonwealth in all cases where, under existing laws, the court has power to order the sale of real estate for the payment of the debts of decedents and for other purposes, may decree and approve a private sale if, in the opinion of the court, under all the circumstances, a better price can be obtained at private than at public sale, as where the interest shall be undivided, or for any other sufficient cause. (Act May 9, 1889, §1, P. L., 182.)

§ 4747 Following are the Rules of the Orphans' Court of Philadelphia Upon Private Sales for Payment of Debts, etc.

Petitions for the sale of decedent's real estate at private sale, for the payment of debts, as authorized by the Act of May 9, 1889, P. L., 182, shall set forth the date of his death, the name of his personal representative, and of the persons interested in his estate under his will, or under the intestate law, as the case may be, stating such as are married women, minors or lunatics, with the names of the husbands, guardians, or committees. Such petition shall also set forth a description of all the real estate the decedent died seised of, a copy of the inventory of personal property filed in the Register's office, a copy of the will, if any, a list of the debts of the decedent, and shall be accompanied by a certificate from the Board of Revision of Taxes of the official valuation of the real estate proposed to be sold, and affidavits of at least two competent and disinterested persons acquainted with the value of real estate in the particular locality, that the price offered for the real estate or undivided interest

therein is a full and fair price and better than can be obtained at public sale.

Such petition shall be filed with the Clerk of the court, and notice of the filing thereof shall be given by personal service upon the widow, if any, of the decedent, and his children, if of full age, and upon their guardians, if minors, when resident within the county, at least ten days prior to the day the court will act upon said petition. If said parties reside out of the jurisdiction of the court, said notice may be served by mail, addressed to their last-known abode. Further notice of the filing of said petition shall be published by the petitioner twice a week for two weeks in a daily newspaper of this county, and once a week for two weeks in the *Legal Intelligencer*, and unless exceptions to the granting of said petition, or objection to the proposed sale, be filed with the Clerk before the second Saturday after the expiration of said notice, the court will then take action upon said petition, at which time due proof shall be presented of the service of notice and publication thereof as above required. Where the value of the real estate, or any interest therein, exceeds one thousand ($1,000) dollars, the petition may be referred by the court to a competent person to examine the facts of the case and report upon the propriety of granting the prayer thereof.

The form of the notice to be given, as directed by the preceding section, shall be as follows:

IN THE ORPHANS' COURT OF PHILADELPHIA COUNTY.

In the matter of the estate of , deceased.

To the heirs, legatees, creditors and other persons interested in said estate.

Notice is hereby given that executor (or administrator as the case may be), has filed in the office of the Clerk of the court, his (or their) petition, praying for an order of sale of the real estate of said decedent described in said petition, at private sale for payment of debts. If no exceptions be filed thereto, or objections made to granting the same, the court will take action upon said petition upon Saturday, A. D. 18 .

(Signed) A. B.
Attorney for Petitioner.

VI. Sales Under the Price Act,

and

VII. Under Proceedings in Partition.

See chapters upon these subjects.

§ 4748 Executors and Administrators in Philadelphia and Pittsburgh Holding Public Sale, to Proclaim Names of Their Testates or Intestates.

Whenever any executor or executors, administrator or administrators, shall expose to sale, at any place or places within two miles of the State House in the City of Philadelphia, or within the chartered limits of the City of Pittsburgh, by way of public auction, vendue, or otherwise, any lands, tenements, goods or chattels of their respective testators or intestates, it shall be the duty of the said executor or executors, administrator or administrators, to make known and declare publicly before and on the day, and at the place of sale, the names of their respective testators, or intestates; and if the same be not done by the said executor or executors, administrator or administrators, the person or persons conducting, or in anywise concerned in the management of such sale, shall be subject to all the penalties provided in the sixth section of the act passed on the second day of April, 1822, against any person or persons not duly qualified to use or exercise the business of an auctioneer. (Act April 1, 1826, §6, 9 Sm., 111.)

CHAPTER XIV

SALES, ETC., OF REAL ESTATE UNDER THE PRICE ACT.

In the chapter on Guardian and Ward it was mentioned that the real estate of a minor may be sold for his maintenance, for the improvement or benefit of his estate, or whenever it was for the minor's interest that such a sale should be made. The Act of March 29, 1832, §§31, 32, 34 (P. L., 198), was cited at length. Reference was also made to the Act of April 3, 1851, §§1, 2, 3, 4 and 5 (P. L., 305), enlarging the powers of the courts to all cases where it is for the interest of the minor or *cestui que trust* to sell, even where his estate is a remainder. To this may be added the power conferred by the Act of March 16, 1847, §2 (P. L., 474), for leasing on ground-rent.

These ample powers have been supplemented by the Act of April 18, 1853 (P. L., 503), entitled "An "act relating to the sale and conveyance of real "estate." Its preamble is of importance in interpreting the law. It reads:

WHEREAS the general welfare requires that real estate should be freely alienable and be made productive to the living owners thereof. AND WHEREAS, in matters which the judiciary is competent to hear and decide, it is expedient that the courts should

adjudicate them after a full hearing of all parties, rather than that they should be determined by special legislative acts upon an *ex parte* hearing.

Then follows the act:

§4749 Jurisdiction of Courts to Decree Sales.

That in all cases where real estate shall have been acquired by descent or last will, the Orphans' Court, and in all other cases the courts of Common Pleas, of the respective counties of this Commonwealth, shall have jurisdiction to decree the sale, mortgaging, leasing, or conveyance upon ground rent of such real estate in the cases hereinafter described: *Provided*, That any such court in the county where the premises shall be situated, shall be of opinion that it is for the interest and advantage of those interested therein, that the same should be sold, mortgaged, leased or let on ground rent, and may be done without injury or prejudice to any trust, charity, or purpose for which the same shall be held; *And provided*, That the same may be done without the violation of any law which may confer an immunity or exemption from sale or alienation. (*Ibid*, §1.)

§4750 When the Decree for Sale, etc., May be Made.

That such sale, mortgaging, leasing or conveyance upon ground rent, may be decreed:

Whenever real estate shall be held for or owned by minors, lunatics or habitual drunkards, so duly found by inquisition, for the sole and separate use of married women, for religious, beneficial or charitable societies or associations, incorporated or unincorporated, or for or by any other corporation:

Or by trustees for any public or private use or trust:

And although there may exist a power of sale, but the time may not have arrived for its exercise, or any preliminary act may not have been done to bring it into exercise, or the time limited for its exercise may have expired, or any one or more persons required to consent or to join in its execution may have become *non compos mentis*, or have removed out of the state, or died, or should refuse to act or unreasonably withhold consent:

Also, when there has been or shall be a defective appointment in any deed, or last will and testament, and the necessary power

is not given to the executor, devisee, or appointee, to make sale and conveyance of real estate:

Also, whenever the owner of real estate may have been absent and unheard from for seven years, under those circumstances from which the law would presume his or her death:

Whenever a husband shall own real estate, having a wife who is a lunatic, or a minor:

Whenever a married woman owns real estate and her husband has abandoned her for two years, or been absent and unheard from for seven years:

Whenever a decedent shall have contracted by parol to sell real estate, and those interested do not think it expedient to plead the statute, requiring contracts to be in writing to enable the purchaser to recover the real estate agreed to be sold:

Whenever a decedent's real estate is subject to the lien of debts not of record:

Whenever real estate shall be entailed, or contingent remainders or executory devises shall be limited thereon:

Or whenever in proceedings in partition in equity it shall appear that real estate cannot be divided without prejudice to the interests of the owners:

And also whenever real estate shall have been purchased, or any ground rent been reserved, and be held by any person acting in a trust or fiduciary capacity:

And such decree may be made whether such ownership or interest shall be held or enjoyed in severalty, joint tenancy, coparcenary, or in common with others:

And generally in all cases where estates have been or shall be devised or granted in trust or for special or limited purposes, or where any party interested therein is under a legal disability to sell and convey the same: *Provided*, That nothing in this act contained shall be taken to repeal or impair the authority of any Act of Assembly, general or private, authorizing the sale of real estate by decree of court or otherwise, nor to affect or impair any right or powers otherwise existing in any persons or corporations to sell, mortgage, lease or let on ground-rent any real estate:

And every power to sell in fee simple real estate created by deed or will, shall be taken to confer an authority to sell and convey, reserving a ground rent or rents in fee, and the same to release

and extinguish according to law, and the stipulation of the deed, and also to grant and convey such ground rent or rents to any purchaser or purchasers thereof, free of all trusts. (*Ibid*, §2.)

§ 4751 How Sale, etc., May be Decreed—Petition to be Filed—Notice Given—Parties May Appear, be Heard, etc.

Such sale, mortgaging, leasing or conveyance upon ground rents may be decreed, on the petition of any trustee, guardian, committee or person interested, clearly setting forth the facts needful for the information of the court, under oath or affirmation; and if all proper parties shall not have voluntarily appeared as petitioners or respondents, the court shall fix a day for parties to appear, and cause a citation to be served on all persons in being who shall not have appeared, and who shall have any present or expectant interest in the premises, warning them to appear, and that they shall be heard on the day designed; and for those who cannot otherwise be served, cause advertisement to be made in manner most likely to afford notice; and service made in any part of the United States and the Territories thereof, with oath or affirmation of the fact, taken before any Judge or Justice of the Peace, and filed of record, shall be good service; and guardians shall be served and appear for their wards; and if minors shall have no guardian, the court shall appoint a guardian for them; committees shall be served and appear for lunatics and habitual drunkards; and husbands shall be served and appear with their wives, except husbands who shall have abandoned their wives for two years, or been absent and unheard from for seven years; and if parties make default in appearing, the court, after investigation of the facts, may proceed to make a decree in the premises: *Provided*, That in case of the appointment of a guardian by the court, and the payment over of money to him, or of the payment of money to any former guardian, the court shall take adequate security for the faithful application of such money; and before the payment of any money to any guardian, not within the court's jurisdiction, the court shall be duly notified that adequate security has been given to the court having jurisdiction over him, whether within or without this Commonwealth. (*Ibid*, §3.)

§ 4752 Examiner May Be Appointed—Sale to be Under Control of Court—Private Sale Authorized in Certain Cases—Security to be Entered, etc.

Such sales, mortgages, leasing and letting on ground rent, shall only take place after full and careful investigation by the court, aided, when deemed necessary, by the report of a competent person to be appointed by the court; and shall be made by trustees, executors, administrators, guardians, committees or owners having a present vested interest, as the court may order; and be under the direction and subject to the approval of the court before which the deed shall be acknowledged, and be certified under seal to have been acknowledged. And all absolute sales in fee simple (except as hereinafter provided), shall be by public sale or vendue, and may be either entirely for cash, or partly on credit and partly for cash, after full advertisement, for at least twenty days, by hand-bills posted in at least twenty of the most public places in the city or county where the premises shall be situated, and in at least two newspapers, not less than three times in each: *Provided*, That if the court shall be of opinion that, under the circumstances, a better price can be obtained at private than at public sale, as where the interest be undivided, or for other sufficient cause, the court may approve and decree a private sale. And such mortgaging, leasing and letting on ground-rent, shall be upon terms and at rates to be approved by the court; and the specific execution of the contracts of decedents, upon the terms and at the price proved or admitted to have been agreed upon by the parties; but no such private sale, leasing or letting on ground rent shall be upon terms or at rates less favorable than others, who, of competent ability to contract and uniting in the sale of undivided interests, shall accept. And it shall be the duty of the court, in decreeing sales, leases and conveyances upon ground rent of real estate, to order the premises, if necessary, to be so subdivided as to command the highest price or greatest rents; and for such purposes, where the premises may admit of or require it, shall have power to lay out roads, streets and alleys, and to vacate such as shall not have been paid for, or received into actual use by the public, if found to be inconvenient, and to make an unprofitable division of the property: *And provided, further*, That no sale or sales shall be ordered or made under

the provisions of this act, in any case, until security, to be approved by the Court of Common Pleas or the Orphans' Court, be given, in at least double the value of the interest proposed to be sold. (*Ibid*, §4.)

§4753 Orphans' Court May Order Private Sale When Better Price Can be Obtained.

From and after the passage of this act, the Orphans' Court of the several counties of this Commonwealth, in all cases where, under existing laws, the court has power to order the sale of real estate for the payment of the debts of decedents *and for other purposes*, may decree and approve a private sale, if in the opinion of the court, under all the circumstances, a better price can be obtained at private than at public sale, as where the interest shall be undivided, or for any other sufficient cause. (Act May 9, 1889, §1, P. L. 182.)

§4754 Title of Purchaser to be Absolute—Purchase Money to Remain a Lien Until Paid.

The title of purchasers under all such sales, mortgages or conveyances upon ground rent, shall be a fee simple title, indefeasible by any party or persons having a present or expectant interest in the premises, and be unprejudiced by any error in the proceedings of the court; and by every such public sale, the premises sold shall be discharged from all liens; and every such sale and every conveyance in fee simple upon ground rent, shall have all the effect of any other proceeding or conveyance now authorized by law, and strictly conducted to a final conclusion, to bar any estate tail and to defeat contingent remainders, and in such case shall vest in the tenant in tail or particular tenant, whether minor, *feme covert* or otherwise, who, after such proceeding or conveyance, might have become entitled to the absolute fee simple title, the absolute right to the purchase money and the ground rents reserved; and such sales and conveyances on ground rent, shall also bar any right of the Commonwealth to forfeit real estate that may have been held by or for any corporation beyond what has been authorized, if no proceeding to procure a forfeiture shall have been commenced before petition filed for a sale or letting on ground rent: *Provided*,

That the petition shall set forth an explanation of the title, and of the purpose to bar the entail, defeat the contingent remainder, or the right of the Commonwealth to have inquisition, for any estate defeasible as aforesaid: *And provided*, That the purchase money or rent reserved shall be a lien on the premises sold or let, until fully paid, according to the decree of the court. (Act April 18, 1853, §5, P. L., 503.)

§ 4755 Proceeds of Sale to be Substituted for Real Estate Sold, etc.

The purchase money, or mortgage money, ground or other rent reserved, shall, in all respects, be substituted for the real estate sold, mortgaged, or let, as regards the enjoyment and ownership thereof, after the payment of liens, and shall be held for or applied to the use and benefit of the same persons, and for the same estate and interest, present or future, vested, contingent, or executory, as the real estate sold, mortgaged, or let, had been held, except only such remainders, after an entailment or contingent remainders, as shall have been barred or defeated as aforesaid; and those entitled to a present interest in such real estate shall receive the interest of the proceeds or rents thereof, unless expressly directed to accumulate: *Provided*, That no principal moneys raised by sale or mortgage as aforesaid, shall be expended for any other purpose than for the payment of liens upon or the improvement of the same real estate when mortgaged, or other real estate when held for the same uses and persons, unless the same be required for the maintenance or education of parties having the like interests vested or expectant, and can be equally and equitably so applied, and without diminution of the capital that may of right become the property of parties having unbarred interests or title in remainder, or by executory devise; and it shall be the duty of the court to decree the proper application of all purchase or mortgage moneys and rents, with the aid of an auditor, when deemed necessary, to the discharge of liens and to parties interested, as and when they may be entitled, and before any decree shall be executed, the person or persons entrusted to execute the same, shall give adequate security to the Commonwealth, to be approved by the court, conditioned for the faithful execution of the trust and proper application of all moneys to be received according to the trust and decree of the court, which security shall enure to the benefit of all parties interested, and such security being so given,

no purchaser or lessee shall be bound to see to the application of the purchase money or rents, or be in any manner liable to or affected by the former trusts or limitations upon the premises. (*Ibid*, §6.)

§ 4756 Squaring and Adjusting Lines Between Adjoining Owners — Partitions — Power to Purchase, etc.

That it shall be lawful for trustees, guardians, committees, married women and corporations, in all the cases aforesaid, under the decree of the court as aforesaid, and with the like effect, and indemnity to them in acting thereunder, to make and take conveyances by deed acknowledged in court, without public sale, in order to square and adjust lines between adjoining owners, to make and take conveyances, to perfect the partition of real estate held in joint tenancy, coparcenary, or in common with others, to purchase other real estate, when needful to that already owned by any such party, or useful to the business thereupon carried on, or when necessary to protect any security or rent held on property exposed to judicial sale: *Provided*, That no corporation shall be so authorized to purchase beyond its charter license: *And provided*, That no purchase or sale by authority of this act, shall change the course of descent or transmission of any property changed in its nature by virtue thereof, as respects persons who are not of competent ability to dispose of it, and all persons intrusted with moneys raised under this act shall be authorized to file their accounts in the court whence their authority was derived, and upon such notice as the court may order to parties interested, or after being audited, if deemed necessary, or by consent of all parties interested, such accounts may be finally confirmed, and upon payment of the balance, as may be decreed by the court, such accountants may be fully discharged from the trust. (*Ibid*, §7.)

§ 4757 Appeals Allowed; but After Twenty Days and After Decree Carried Into Effect, Reversal Shall Not Affect Title.

That in all cases and proceedings under this act, appeals may be taken to the Supreme Court from the Orphans' Court, as now provided by law in other cases, and in the Court of Common Pleas,

as provided in equity cases, in the respective counties of the State: *Provided*, That if any decree be carried into execution before the appeal be perfected, and written notice thereof given to any vendee, mortgagee, or lessee, any reversal thereof shall not affect the right or title of such vendee, mortgagee, or lessee, but the purchase or mortgage moneys or rents shall stand in lieu of the premises sold or mortgaged, or leased, so far as thus encumbered: *Provided further*, That before any decree be carried into effect to afford such indemnity, twenty days be allowed from its entry to take and perfect such appeal. (*Ibid*, §8.)

§4758 Prohibition of Accumulations Beyond the Term Named.

No person or persons shall, after the passing of this act, by any deed, will, or otherwise, settle or dispose of any real or personal property, so and in such manner that the rents, issues, interests or profits therof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers or testator, and the term of twenty-one years from the death of any such grantor, settler or testator, that is to say, only after such decease during the minority or respective minorities, with allowance for the period of gestation of any person or persons who, under the uses or trusts of the deed, will, or other assurance directing such accumulation, would, for the time being, if of full age, be entitled unto the rents, issues, interests, and profits so directed to accumulate; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void in so far as it shall exceed the limits of this act, and the rents, issues, interests and profits so directed to be accumulated, contrary to the provisions of this act, shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed: *Provided*, That any donation, bequest, or devise for any literary, scientific, charitable, or religious purpose, shall not come within the prohibition of this section, which shall take effect and be in force, as well in respect to wills heretofore made by persons yet living and of competent mind as in respect to wills hereafter to be made: *And provided*, That notwithstanding any direction to accumulate rents, issues, interest, and profits, for the benefit of any minor or minors, it shall be law-

ful for the proper court as aforesaid, on the application of the guardian, where there shall be no other means for maintenance or education, to decree an adequate allowance for such purpose, but in such manner as to make an equal distribution among those having equal rights or expectancies, whether at the time being minors or of lawful age. (*Ibid*, §9.)

§ 4759 Security, etc., In All Cases—No Decree Except by President Judge or Law Judge.

The directions given in the sixth section of this act, in regard to the security to be given in cases of sales, mortgage, or letting of real estate, and the condition of the bond or security therein prescribed, shall apply to all cases of sales or mortgage of real estate, by order of the courts of this Commonwealth: *And provided*, That no decree for the sale, mortgaging or letting of any real estate under the provisions of this act shall be made except when the President of the court, or the law Judge or judges thereof, shall be present, and that the acts in relation to special courts, where the president Judge shall be interested, related to parties in interest, or otherwise incapable of acting, shall apply to all such provisions. (*Ibid*, §10.)

§ 4760 Deeds by Trustees Residing Out of the County May Be Acknowledged Where Trustees Reside.

In all cases of sales, mortgages, leasing and letting on ground rent, of any real estate authorized under the act to which this is a supplement, where the trustees, executors, administrators, guardians, committees or other persons authorized to make such sale, mortgage or lease, shall reside out of the county where such real estate is situate, the deed, mortgage or lease thereof, may be acknowledged before the Court of Common Pleas or Orphans' Court of any county of this State, where the person or persons executing the same may reside, and certified under the seal of such court to have been so acknowledged; and such certificate of acknowledgment shall be read in open court of the county where the real estate is situate, and entered upon the records thereof; and upon being so entered, shall have the same effect as if the deed, mortgage or lease had been acknowledged before said court, as now required by law. (Act April 13, 1854, §1, P. L., 368.)

§ 4761 Courts May Authorize Investment of Trust Funds in Ground Rents or Other Real Estate —No Change of the Trust.

It shall and may be lawful for any trustee, committee, guardian, or other person acting in a fiduciary capacity, to invest trust moneys in ground rents or other real estate, by leave of the proper court, under proceedings as provided in the act to which this is a supplement: *Provided*, That it shall be the opinion of the court that such investment will be for the advantage of the estate, and no change be made in the course of succession by such change of investment, as regards the heirs or next of kin of the *cestui que trust*. (*Ibid*, §2.)

§ 4762 Sale, etc., Without Leave of Court, May be Confirmed.

In all cases wherein any of the courts of this Commonwealth might have authorized any sale or conveyance, or letting on ground rent or otherwise, and such sale, conveyance or letting may have been made without the leave of such court, it shall be lawful for such court, if approving of such sale or conveyance, or letting, to approve, ratify and confirm the same, with the same effect as if such decree had preceded such sale, conveyance or letting. (*Ibid*, §3.)

§ 4763 Concurrent Jurisdiction of Common Pleas and Orphans' Court if Title Partly by Deed and Partly by Descent or Will.

Under the Act of the 18th day of April, 1853, entitled, "An "act relating to the sale and conveyance of real estate," whenever the estate shall have been derived partly by deed and partly by descent or will, either the Court of Common Pleas or the Orphans' Court may entertain jurisdiction of the proceeding to make sale or lease thereof. (Act April 27, 1855, §5, P. L., 369.)

§ 4764 Retroactive Confirmation of Sales of Lunatics' Lands Prior to April 26, 1856.

In all cases where sales of the real estate of lunatics have been made under the Act of the 18th day of April, 1853, entitled "An "act relating to the sale and conveyance of real estate under a

"decree of the Court of Common Pleas," the same shall be valid and effectual, notwithstanding such real estate may have been derived by descent or will. (Act April 21, 1856, §1, P. L., 486.)

§ 4765 Non-Resident Guardians, Trustees, etc., May Acknowledge Deeds Outside of the State.

In all cases of sales, mortgages, leasing and letting on ground rent of any real estate authorized by the act to which this is a further supplement, when the trustees, executors, administrators, guardians, committees, or other persons authorized to make such sale, mortgage, or lease, shall reside out of the State where such real estate is situate, the deed, mortgage or lease thereof may be acknowledged in the manner prescribed by the third section of the Act of Assembly, entitled "An act relating to the authentication of letters of "attorney, protest of notaries public and assignments made out of "the State, and to the acknowledgment of deeds," approved the fourteenth day of December, Anno Domini, 1854: *Provided*, That such sale, mortgage, or lease, etc., be first approved by the court when such approval is necessary. (Act April 1, 1863, §1, P. L., 187.)

The act here cited of December 14, 1854, §3 (P. L., 725), provides for acknowledgment of deeds, etc., executed in any of the United States "to be taken in "due form before any officer or magistrate of the State "wherein such deed, *et cetera*, is executed, authorized "by the laws of said State to take the acknowledg- "ment of deeds * * * and the proof of such "authority shall be the certificate of the Clerk or "Prothonotary of any court of record in such State "that the officer * * * so taking such acknowl- "edgment is duly qualified by law to take the same."

§ 4766 Trustees, Guardians, etc., May Make Deeds Without Public Sale and Accept Deeds Changing Rights of Way.

It shall be lawful for trustees, guardians, committees, married women, and corporations, in addition to the powers conferred by the seventh section of the act to which this is a supplement, under

the decree of the proper court, and with the like effect, and indemnity to them in acting thereunder, to make and take, or to join with owners of other undivided interests in making and taking conveyances, by deed acknowledged in court, and without public sale, in order to change, in part or in whole, the route or location of any right of way or passage existing over and upon adjoining or other lands: *Providcd*, The court shall be of opinion that (it) is for the interest and advantage of the owner or owners, of the land to which such right of way is appurtenant, that such change of route or location be made: *And provided further*, That it shall be in the discretion of the court, in such cases, to require security or not, from the person or persons aforesaid, making or taking such conveyances. (Act April 18, 1864, §1, P. L., 462.)

§ 4767 Acknowledgments Before a Justice, etc., Valid.

In all cases where sales, mortgagings or leasings of any real estate have heretofore been, or shall hereafter be made, under the provisions of an Act of Assembly entitled, "An act relating to the "sale and conveyance of real estate," approved the eighteenth day of April, 1853, and the deeds, mortgages or leases made in pursuance of such sales, mortgagings or leasing have been acknowledged before a Justice of the Peace, or other officer having authority under the laws of this Commonwealth to take the acknowledgment of deeds and other instruments of writing therein, such deeds, mortgages and leases shall be as valid and effectual, to all intents and purposes, as if the same had been acknowledged before the court, and in the manner specified in said act. (Act April 17, 1866, §1, P. L., 108.)

§ 4768 Under Act of 1853, Deeds Acknowledged in Court and so Certified, May be Recorded—Security May be Approved in County of Grantor's Residence.

All deeds made to convey real estate, sold under an act passed the eighteenth day of April, 1853, entitled "an act relating to the "sale and conveyance of real estate," being acknowledged in court, and so certified to have been by the Clerk or Prothonotary, as required by said act or supplements, may be recorded in the Recorder of Deed's office, without other acknowledgment; and

the security required by said act may be approved by the proper court of like jurisdiction of the county in which the grantor or one of them is resident, and be certified, under seal of such court, to that wherein the sale was decreed; and such certificate shall be copied on the records thereof. (Act March 23, 1867, §1, P. L., 43.)

§ 4769 Private Sales Under Order of Court Discharge Decedent's Debts, Except Debts of Record and Mortgages.

Private sales made by order of the court, under the said Act of the eighteenth day of April, 1853, shall discharge the premises sold from the lien of the debts of the decedent, except debts of record, and debts secured by mortgage: *Provided*, That the security required by said act shall have been duly entered. (*Ibid*, §2.)

§ 4770 Sales Before May 1, 1861, Under Orphans' Court Order—One Executor or Guardian, etc., Dying Before Deed Made, Survivor Can Convey—Where Authority Shall be Given and One Trustee Dies, Survivor May Sell, Convey, etc.

In all cases where a sale of the real estate of a decedent hath heretofore been made by executors, or administrators, or guardians, under an order of the Orphans' Court, and one or more of such executors, or administrators, or guardians, hath or have died before a conveyance hath been made to the purchaser, it shall and may be lawful for the surviving executor or executors, administrator or administrators, or guardians, as the case may be, to execute and deliver to the purchaser a deed of conveyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale. Where authority is or shall be given by decree of court to trustees, or other persons, to sell real estate, and any such trustees, or other persons authorized, shall have died, resigned, or ceased to act before a sale is effected or a deed executed; in all such cases sales may be effected and a deed executed by the surviving or succeeding trustee or trustees, or other persons, with as full effect in all particulars as if effected or executed by the persons acting in the trust, or other office, at the time a sale was originally decreed. Every deed made in pursuance of and agreeably to the provisions

of this act, shall vest the property therein described, in the grantee, as fully and effectually as if the same had been made by all the persons who may have sold any such estate circumstanced as aforesaid. (Act May 1, 1861, §2, P. L., 431.)

§ 4771 When Lease of Mining Lands Decreed, They May be Consolidated with Adjoining Lands, etc.

Whenever, under the provisions of the aforesaid Act of April 18, 1853, and the several supplements thereto, the courts of this Commonwealth or any of them, have power to decree a lease of lands for mining purposes, it shall be further lawful for the said courts to order and decree that such lands may be so combined and consolidated with other adjoining lands, as to form one tract in which the several persons or parties so combining and consolidating shall become seised of undivided interests, proportionate to their several divided interests before such combination and consolidation, and that the rents or royalties to be received under such lease shall be in the like proportions. (Act June 8, 1874, §1, P. L., 277.)

§ 4772 If Security Entered, Irregularity Shall not Affect Title.

Whenever, in pursuance of proceedings in the Orphans' Court, or Court of Common Pleas of any county, any person therein described as a trustee, guardian, executor, administrator or as standing in any other fiduciary relation to the parties interested, shall grant and convey any real or personal estate, in which proceedings security shall be duly entered by him or her, under the order or decree of the court, no irregularity or defect in his or her original appointment, or the absence of any proper qualification in respect thereto, shall affect the title of the grantee or purchaser, or the securities so entered, but the same shall be as valid in all respects as if such irregularity or defect had not existed: *Provided*, That this act shall not be construed to apply to any adversary action or other judicial proceeding, heretofore commenced or taken, for the recovery of property sold under any such order or decree, by reason of such irregularity, or to any action or proceeding now pending. (Act April 28, 1876, §1, P. L., 50.)

§ 4773 Courts May Order Private Sale of Real Estate by Trustees of Religious Societies, etc., to Associations for Cemeteries.

Whenever the several courts of this Commonwealth are authorized by existing laws to decree the sale and conveyance of real estate, and it appears to the court of the proper county, on application, that such real estate is held by trustees of religious societies, congregations or church organizations, which are desirous of selling and conveying a portion of said real estate to an association or corporation for the exclusive purpose of a cemetery or place of sepulchre for the dead, it shall be lawful for said court to order and decree a private sale of said real estate at such price and upon such terms and conditions as shall he agreed upon by said parties, notice of said application to be given to all parties interested as the court shall direct; the sale to be approved by the court and the deed acknowledged as required by existing laws. (Act March 24, 1877, §1, P. L., 39.)

§ 4774 If Guardian, Trustee, etc., Die Before Executing Deed, Court May Order its Clerk to Convey.

Whenever any Orphans' Court or Court of Common Pleas having authority under existing laws to decree a sale of real estate shall issue an order to any executor, administrator, guardian, or trustee, either specially appointed for the purpose or otherwise, to sell such real estate, and shall confirm such sale, and such administrator, executor, guardian or trustee shall die before the execution of a deed to such purchaser, the proper court shall have power, on the petition of the purchaser, to direct the Clerk of such court to execute and deliver to the purchaser the necessary deed of conveyance for such real estate, on his full compliance with the terms and conditions of sale, paying into court the moneys payable, and delivering to the Clerk the securities required by the said terms and conditions, which moneys and securities shall remain subject to the disposition of the court; and said deed shall be valid and available to such purchaser as fully as if it had been executed and delivered by the proper administrator, executor, guardian or trustee under existing laws. (Act May 22, 1878, §1, P. L., 83.)

§ 4775 Court May Order Clerk to Execute Deed Where Trustee Purchases by Leave at His Own Sale.

Whenever any Orphans' Court or Court of Common Pleas, having jurisdiction to decree a sale of real estate, shall issue its order to any administrator, guardian, executor or trustee, specially appointed for the purpose or otherwise, to sell such real estate, and shall, in any case within its jurisdiction, give authority to any administrator, executor, guardian or trustee to bid at such sale, and said court shall confirm the sale of said real estate to such administrator, executor, guardian or trustee, the said court may make an order directing its Clerk to execute a deed for said real estate to such purchaser, who shall account for the amount of such purchase money, in the settlement of his accounts with the Register of Wills, to said Orphans' Court, or Court of Common Pleas, as the case may be. (*Ibid*, §2.)

§ 4776 Clerks' Deeds Executed Before 1878 Validated.

Whenever any Orphans' Court or Court of Common Pleas shall have heretofore made an order for its Clerk to execute a deed, in any of the cases mentioned and provided for in the first and second sections of this act, and such deed shall have been accordingly executed and delivered, such deed shall be valid and available to the purchaser to vest in him the right, title and interest of the person as whose land the said real estate had been sold. (*Ibid*, §3.)

§ 4777 Grantee Not Personally Liable for Ground Rent, Mortgage, etc , Unless He Expressly Assume, etc.

Grantees of real estate which is subject to ground rent, or bound by mortgage or other incumbrance, shall not be personally liable for the payment of such ground rent, mortgage or other incumbrance, unless he shall, by an agreement in writing, have expressly assumed a personal liability therefor, or there shall be express words in the deed of conveyance, stating that the grant is made on condition of the grantee assuming such personal liability: *Provided*, That the use of the words "under and subject to the "payment of such ground rent, mortgage or other incumbrance," shall not alone be so construed as to make such grantee personally liable as aforesaid. (Act June 12, 1878, §1, P. L., 205.)

§4778 Extent of Grantee's Personal Liability Under Preceding Section.

The right to enforce such personal liability shall not inure to any person other than the person with whom such an agreement is made, nor shall such personal liability continue, after the said grantee has *bona fide* parted with the incumbered property, unless he shall have expressly assumed such continuing liability. (*Ibid*, §2.)

§4779 The History of the Act of 1853

is clearly stated by its author, the Hon. Eli K. Price, in his valuable work, "Price on Real Estate." Under resolution of the Legislature, May 4, 1852 (P. L., 638), the Governor appointed three Commissioners to revise our laws *inter alia* as to the sale of real estate by trustees. Though not one of the Commissioners, Mr. Price was requested to draft this act. In doing so, over one thousand statutes were considered. The report accompanying the bill says:

In conclusion, we may say that there is nothing dangerous in this bill to vested rights, or the security of property. It takes away no person's rights, but converts that which is dead and unproductive into productive estates, and thus to make property subserve the purpose intended, in the maintenance and comfort of its owners, or those who should enjoy its fruits and products. There is nothing authorized by this bill that has not been repeatedly authorized by the Legislature, and in every line we have followed established precedents.

The practitioner may, perhaps, be assisted by the following:

§4780 Analysis of the Act of 1853, and the Supplements.

1. *The division of jurisdiction between the two courts.*

In the cases hereinafter named, the Orphans' Court has jurisdiction where the property has been acquired by descent or last will.

Where the property has been devised partly by deed and partly by descent or will, either court may make a sale or lease. In other cases the application must be to the Common Pleas.

The county must be that in which the lands lie.

Jurisdiction When Title Partly by Descent and Partly by Deed.

In *Reed* vs. *Palmer*, 53 Pa. St., 379 (1866), it was contended that the Orphans' Court and not the Common Pleas, had jurisdiction because the minor's estate came to her by descent. The title to the land originally in Avery was conveyed to Shinn in trust for Avery for life; after his death, the net proceeds to Rebecca Palmer, until death of Martha Avery, then Shinn was to convey to Rebecca Palmer in fee. Avery, by his will, directed his executors to do all things necessary to carry out these trusts. After death of Avery and of Rebecca Palmer, Shinn, with consent of the executors, conveyed to Rebecca's daughter, Mary. Her guardian petitioned the Court of Common Pleas for leave to make a private sale under Act of April 18, 1853. This was granted. The purchaser raised an objection to the jurisdiction. It was held, that when, Shinn conveyed "to Mary after the death of her "mother, the case had occurred of an estate *derived* "partly by descent and partly by deed, and this gave "either court jurisdiction, that which first attached "becoming exclusive."

"The objection that Shinn had conveyed before "the death of Mrs. Avery is one that Mrs. Avery "might perhaps have urged; but it does not lie in the "mouth of the purchaser to urge it. * * * It is "cured by the death of Mrs. Avery since."

It will be observed that this decision was after the Act of April 27, 1855. At first (Act April 18, 1853), the jurisdiction of the Orphans' Court attached only where the real estate had been "acquired by descent "or last will." But by the Act of April 27, 1855, either court has jurisdiction when the estate has been "derived partly by deed and partly by descent or "will."

2. *The decree authorized* is for sale, mortgaging, leasing or conveying upon ground rent.

In what cases the decree can be made. It must be for the advantage of all parties in interest; without injury or prejudice to any trust or charity for which the property is held or violation of any law exempting it from sale. The real estate must be held for or owned by: (*a*) minors, lunatics or habitual drunkards so duly found; (*b*) for the sole and separate use of married women; (*c*) for religious, beneficial or charitable societies or associations corporated or unincorporated; (*d*) for or by any other corporation; (*e*) by trustees, public or private, although there be a power of sale, the time for its exercise not having arrived or having expired, no preliminary act having been done to bring it into exercise, or some party whose consent is necessary is *non compos*, absent, dead or refuses to act; (*f*) when there is a defect of power in the will or deed; (*g*) when the owner can be presumed dead; (*h*) when the owner has a lunatic wife or she is a minor; (*i*) when a woman is owner and her husband has abandoned her for two years or been unheard from for seven years; (*j*) when a deceased owner contracted to sell by parol and it is not desired to plead the statute; (*k*) when the estate of a decedent is subject to lien of debts not of record; (*l*) cases of entails, contingent remainders and executory

devises; (*m*) partition where division cannot be made without prejudice; (*n*) where real estate has been purchased or any ground rent reserved and held by any person acting in a trust or fiduciary capacity; (*o*) whether the ownership be in severalty, joint tenancy, coparcenary or common; (*p*) all devises and grants in trust, or for special or limited purposes, or where any party interested is under legal disability.

The last clause would seem to embrace some of its predecessors.

The following decisions may be examined under the first and second sections of the act:

§ 4781 Decisions as to When the Court Will Act.

When there are debts not of record, when personal assets are insufficient, sale may be decreed. *Hower's Appeal*, 55 Pa. St., 337 (1867).

Even where there is a devise over after a fee. *Grenawalt's Appeal*, 37 Pa. St., 95 (1860).

A sale may be decreed of real estate owned by a church, although there be a restraint in the charter against alienation. *Burton's Appeal*, 57 Pa. St., 213 (1868).

"The Act of April 18, 1853, is a remedial statute "and is to be benignly expounded. The right to "decree a private sale does not depend at all upon "the existence of other undivided interests and the "exhibition in the application of a willingness on part "of other parties interested to take a given sum." THOMPSON, J. *Gilmore* vs. *Rodgers*, 41 Pa. St., 128 (1861).

In this case, it was contended that the Orphans' Court had no power to decree a private sale; that the act only authorized sales of undivided interests where the others joined in the conveyance. That here the

guardian had made a clear mistake in saying his wards owned one-half when they really owned five-sevenths, etc. But the Supreme Court held that a valid title passed. READ, J., dissented.

The sale of a minor's real estate will be ordered, although in the event of his death during minority the proceeds would go to parties other than those to whom the land would have descended. *Drayton's Estate*, 6 Phila., 157 (1866).

Where a guardian sold at private sale the interest of a minor in a decedent's estate, the court directed the proceeds to be paid to the decedent's executor for the purpose of paying debts due by such decedent. *Yard's Estate*, 15 W. N., 422 (1884).

A life estate held in trust may be decreed to be mortgaged. *Ex parte Carswell*, 1 Phila., 521 (1854).

A testamentary trustee sold at private sale certain land which was subject to a mortgage made during the life of the decedent, and two judgments against beneficiaries after the decedent's death. Certain contingent remainders were created by the will. Neither the order of sale nor the sale itself provided for the liens. *Held*, That the sale was enforceable; the contingent remainders could be secured under §6 of the Price Act, and the purchaser could be protected by proper orders of the court as to the liens. *Moorhead* vs. *Wolff*, 123 Pa. St., 365 (1889.)

Where the owners of real estate of which the former owner has not been dead five years, apply to mortgage the same, it is only necessary to show the court that the proposed mortgage will benefit the owners and that adequate security will be entered for the protection of possible creditors. *Orwig's Estate*, 46 Leg. Int., 99 (1889).

PENROSE, J.: "The Act of 1853, as has often been "said, is a remedial statute, and is to be benignly "construed."

§ 4782 Decisions as to When Court Will Not Act.

If the title be disputed. *Hower's Appeal* 55 Pa. St., 337 (1867).

Title cannot thus be settled. *Ex parte Bridesburg Land Co.*, 7 Phila., 436 (1870).

When a guardian petitions for sale of a minor's undivided interest, the parties *sui juris* should unite with him; if there be debts due by the deceased under whom the minor claims, the representatives of the deceased should be made parties. *Pierce's Estate*, 3 Brews., 254 (1869).

A sale of trust property will not be decreed to the *cestui que trust*, unless for excellent reasons. *Ex parte Sharpe*, 6 Phila., 153 (1866).

The decree is not of right. The first section expressly puts the responsibility upon the court.

They are to "be of opinion that it is for the inter- "est and advantage of *those interested* therein that the "same should be sold."

In *Van Dusen's Estate*, 29 W. N., 573 (1892), the testator had been dead for more than twelve years; the lien of his debts had expired; his will created no trust; there were no contingent remainders or executory devises; the owners were of full age, under no disability and the interests of all had vested. *Held*, That under the facts the Orphans' Court could not decree the sale of real estate, although it appeared that the sale would be for the interest and advantage of all interested.

Under the Price Act, the Orphans' Court cannot order a decedent's land to be mortgaged or sold for the payment of debts. *Spencer* vs. *Jennings*, 114 Pa. St., 618 (1886).

An order for the sale of a minor's real estate need not be made, under the Price Act, by the court having jurisdiction of the guardian's account. *Morrison* vs. *Nellis*, 115 Pa. St., 41 (1886).

Where the jurisdiction of the court attaches, as against all persons made parties, the title of the purchaser is unaffected by an error in the proceedings. Whether such sale is for the interest of the minor is a question concluded by the decree of the Orphans' Court. The Supreme Court will not make such investigation. (*Ibid.*)

A. petitioned the Orphans' Court, and falsely alleging her previous appointment as guardian of certain minors, obtained an order to mortgage their real estate. *Held*, That such order was invalid and could be impeached in a suit to cancel and satisfy the mortgage. *Grier's Appeal*, 101 Pa. St., 412 (1882).

§ 4783 Who Should be Made Parties.

All having a present interest must be parties. *Smith* vs. *Townsend*, 32 Pa. St., 434 (1859).

If the notices required be not given, no title passes. *Taylor* vs. *Hoyt*, 15 Atlan. Rep., 892 (1888).

Parties *sui juris* should unite in a guardian's petition, and the representatives of a decedent should be made parties, where there are debts due by such decedent under whom the minor claims. *Pierce's Estate*, 3 Brews., 254 (1869).

The petitioner must be a "trustee, guardian, com-"mittee or person interested." If all parties do not voluntarily appear as petitioners or as respondents, a

citation must be served on all having any interest, present or expectant. Service may be made in any of the United States or the Territories. Affidavit must be made of the service before a Judge or Justice. Guardians may be served for their wards, and must be appointed for minors without wards. Committees must also be served. Husbands must be served, except those who have abandoned their wives two years or have been absent and unheard from seven years.

If the husband of any party cannot be served for these reasons, the petition should so aver or it should be made so to appear in an affidavit. Everything—however small—necessary to give jurisdiction and to show regularity, must appear upon the record.

If a guardian be required, the plaintiffs should present a separate petition referring to the first and showing the necessity of having a guardian appointed. Guides for this may be found in the chapter on Guardian and Ward. Notice of this application must be given to the ward and to the next of kin. The petitioner cannot expect the court to act without proper application. *Graham's Estate*, 14 W. N., 31 (1883).

Security must be entered by the guardian as the court may direct.

§4784 The Petition.

It cannot be too often repeated that before drafting any pleading, the facts should be carefully written down. In this proceeding title passes, it may be, to a valuable estate,—certainly of value to the parties. The names, dates, references to deeds, wills, full description of the property, etc., are all necessary.

Ascertain who will petition, who will appear as respondents, who are to be served, etc. In drafting the petition, set out the facts historically and clearly. Be very sure to show that the court has jurisdiction. Quote the act and bring your case within its words.

If the petition be presented with the object of defeating a contingent remainder, set forth such purpose, as required by §5 of the act. *Westhafer* vs. *Koons*, 144 Pa. St., 26 (1891).

A petition under the Price Act should contain a description of the land and a copy of the will, and should show the petitioner's interest. *Heffner's Appeal*, 119 Pa. St., 462 (1888).

In *Lambrecht's Estate*, 22 W. N., 24 (1888), HANNA, P. J., stated the requisites of a petition to sell at private sale under the Price Act, and held that the petition before the court was defective in the following respects :

"(1) It does not have a copy of the will annexed.

"(2) It need not describe all the real estate. That "applies to a petition for a public sale to pay debts. "Only the real estate proposed to be sold should be "described.

"(3) There should be a separate petition for each "property proposed to be sold. They should not be "combined in one petition. Each petition stands "alone, and if granted is in the line of title to the indi- "vidual purchaser. This applies only where the pur- "chasers are different, as in this case ; of course, if the "person buys two properties, or all, it is proper to "have one petition.

"(4) The petition should state there are debts not "of record, and annex a list of them, if known, but "should not state, as here, 'that the personal estate "'is insufficient to pay them.' Nor should any copy "of inventory be annexed, nor list of debts, except "those not of record, as referred to in the petition.

"(5) A petition under the Act of 1853 should be "carefully drawn. And this petition does not give any "reason for the sale of either of the properties, nor "why it will be for the interest and advantage of the "parties interested that they should be sold."

A petition to sell a minor's real estate should show from whom the minor's title was derived. In cases where the guardian derives his power solely from courts of another State, and the ward is also a non-resident, the petition should have attached a certificate that security has been given by the guardian in such other State in double the property's value. It should also appear that the laws of that State allow a like privilege to citizens of this State. *Goldsmith's Estate*, 37 Leg. Int., 465 (1880).

The Philadelphia Court Rule is as follows:

Petitions for the sale of real estate in other cases shall set forth all necessary facts, with names of parties in interest (stating such as are married women, minors or lunatics, with the name of husbands, guardians or committees) * * * and shall be accompanied by the certificate of the Board of Revision of Taxes, of the valuation of the real estate asked to be sold and by affidavits of competent persons acquainted with the value of real estate in the particular locality. Where the value of the interest asked to be sold exceeds one thousand dollars, the petition may be referred by the court to a competent person to examine it and report upon the propriety of granting the same.

Remembering that facts always vary, the following may serve as a guide:

§ 4785 Form of Petition by Guardian for Sale Under the Price Act.

To the Honorable, the Judges of the Orphans' Court for the County of

The petition of , guardian of minor children of , deceased, respectfully represents: That , late of , died intestate on or about , seised in fee of the following described messuage and tract of land, to wit:

That the said left and further, your petitioner sets forth that he was duly appointed guardian of the real estate of the said minors hereinbefore named, by your honorable court, and gave security for the proper discharge of his duties as such according to law, and has acted and still does act as guardian of the estates of said children. That said messuage and tract of land produces an annual rent , and is free from all incumbrances, trusts and charities, and is the property of all the said as heirs-at-law and next of kin of said , deceased, according to their respective interests therein under the intestate laws of this State. And your petitioner further represents that the whole of said tract of land is about of the value of , according to the best estimate he is able to put upon the same, and that the sale of the estate of said minors, to wit, would be to their interest and advantage; as the rents, issues and profits thereof do not amount to as much as the interest of the proceeds of the sale of their estates in said land at a fair valuation would amount to. He further represents that is willing to purchase all the estate, right, title, interest, property, claim and demand, of them the said minor children of , of, in, to, and out of the said messuage or tract of land, at the sum of , payable as follows: , the deed to be made at the time of the first payment, and the other payments to be secured by bond and mortgage on the premises; which sale the said minors and are desirous should be made, as per their letter to your petitioner hereto attached. And which price in the opinion of your petitioner is more than can be obtained under public sale. Your petitioner, therefore, prays your Honorable Court to approve of and decree a private sale of the estate, right, title, interest and claim of said minors, children of , of, in, to, and out of the said messuage and tract of land, upon such terms and rates as shall be approved of by your Honorable Court,

upon your petitioner giving such security as your Honorable Court shall approve, according to the Acts of Assembly in such case made and provided.

And your petitioner will ever pray.

Affidavit.

Attach certificate of Board of Revision of Taxes of assessed valuation of real estate to be sold and the affidavits of others supporting the petition.

Sometimes the petition is referred to an examiner.

Form of Reference to Examiner.

And now this petition is referred to , Esq., as examiner to take proofs and report to the court as to the propriety of granting the decree prayed for.

(Initials of Judge.)

Proceedings Before Examiner.

The examiner fixes a day agreeable to counsel, notifies all parties in interest, takes the depositions, reports to the court all the proofs, his opinion, form of decree, and attaches copy of the notice of meeting and proof of its service.

The Bond of Petitioner

should be filed, executed by the petitioner with approved security in double the amount, conditioned for the faithful performance by the guardian of his duties in the matter of the sale of the real estate and the proceeds arising therefrom belonging to said minors, etc. (§§3 and 4 of the Act.) Although, as hereinafter stated, this bond may be filed at any time before confirmation, and although the omission to file any bond may not affect the purchaser's title, still it is recommended that all purchasers see that the law is complied with. A purchaser at a private sale may suffer by neglect of this suggestion.

Rights of Defendants.

It is hardly necessary to observe that any person interested has the right to file a demurrer and argue that the petition does not make out a proper case, or an answer, as in other cases.

FORM OF DECREE FOR PRIVATE SALE OF MINOR'S ESTATE.

And now, to wit, , the foregoing petition being presented in open court, and the said court having duly given the said petition and matters therein contained a full and careful investigation, and the court being of opinion that it is for the interest and advantage of the parties interested, that their right, title and interest in said land should be sold, and that said sale may be made without injury or prejudice to any trust or charity, or any purpose for which the said lands are held; and that said sale may be made without violating any law which may confer any immunity or exemption from sale or alienation; and the court being further of opinion, that, under the circumstances in the case, a better price can be obtained at private sale than at public sale, and said having given security for the faithful performance of his duties as guardian in the matter of said sale, and the proceeds arising therefrom, which said security has been approved by the court, said court do now approve and decree a private sale of the estate, right, title, interest, property, claim and demand of the said minor children of , deceased, to wit: , of, in, to and out of the said messuage and tract of land, upon the following terms and rates, that is to say, for the sum of , payable in cash, and the balance in , with interest, the deed to be made, executed and delivered by the said , at the time of the payment of the said cash, and the balance of the payments to be secured by bond and mortgage on the premises.

(Initials or signature of Judge.)

§ 4786 Form of Petition of Guardian to Confirm Sale.

To the Honorable, the Judges of the Orphans' Court, of County.

, guardian of , minor children of , deceased, respectfully showeth: That in pursuance of the order of your Honorable Court, made at of term

he did (date), sell the estate and interest of the said minors in the tract of land and messuage, situate in township, county, and State of containing , of which the said , deceased, was seised at the time of his death, as the same is fully described in said order unto , for the sum of , payable as follows, to wit: in cash, and the balance in with interest. He, therefore, prays your Honorable Court to ratify, approve and confirm said sale, and to permit him to acknowledge a deed to said for the same in open court, and decree that he deliver said deed on receipt of the purchase money and securities.

And he will ever pray, etc.

(Signature and affidavit of petitioner.)

FORM OF DECREE CONFIRMING SALE.

And now, to wit: the court ratify and confirm the sale made by guardian, to , as within reported, and direct him to acknowledge in open court, a deed for the same, and deliver said deed upon his receiving the purchase money and said securities.

(Initials or signature of judge.)

§4787 Form of Conclusion of Petition for Sale in Cases of Contingent Remainders, etc.

In cases of this kind, Mr. Price (Price on Real Estate, p. 100) gives the following valuable recommendations:

The prayer of the petition should conclude that the purchaser may take a title in fee simple, indefeasible by any person or persons having a present or expectant interest in the premises; and that the purchase money shall, in all respects, be substituted therefor, and be applied to the uses of the same persons, for the same estate and interest, as the real estate sold had been held, except that tenant in tail should take the price after discharging liens. This prayer should be made to guard against any inference that the proceeds are to become absolute in the hands of the particular tenant, as upon the destruction of a contingent remainder by common recovery, the fee enures to him unless a deed to lead the uses of the recovery express another purpose. This will also remove all apprehensions from the beneficiaries that the purchase moneys will be

diverted from subserving the same limitations that had before bound the realty sold ; and will assure them that the security required to be entered shall stand for their benefit and security, and the purchase moneys be paid to them as required by the limitations.

§ 4788 Sales—Security—Title of Purchaser.

The security need not be given before the decree is made. It is sufficient if given before confirmation. *Thorn's Appeal*, 35 Pa. St., 47 (1860) ; *Grenawalt's Appeal*, 37 Ibid, 95 (1860) ; *Brook's Estate*, 3 Phila., 516 (1859).

The right of a *cestui que trust* in the proceeds is not affected by the sale. *Hepburn's Appeal*, 65 Pa. St., 468 (1870).

Title is not divested until delivery of the deed. *Overdeer* vs. *Updegraff*, 69 Pa. St., 110 (1871).

Before confirmation, the decree may be opened and a better offer accepted. *Brown's Appeal*, 68 Pa. St., 53 (1871).

Confirmation makes good title, if the court have jurisdiction. *Smyth* vs. *Neill*, 1 W. N., 43 (1874) ; *Gilmore* vs. *Rodgers*, 41 Pa. St., 128 (1861).

A sale of land, the owner having been absent for seven years, without giving him notice, personal or by publication, as required by the act, passes no title. *Taylor* vs. *Hoyt*, 15 Atl. Rep., 892 (1888).

Confirmation is a matter for sound discretion of the court below ; generally not reviewable. *Frey's Appeal*, 8 Atl. Rep., 585 (1887).

In the absence of fraud, the Orphans' Court will not open a decree confirming a sale of real estate after ten years have elapsed, upon the petition of one setting forth he was a minor at the time of the proceedings, and had a contingent interest but no notice. *Grindrod's Estate*, 140 Pa. St., 161 (1891).

§ 4789 Effect of Omission to Enter Security.

The omission of the trustee selling to enter security does not effect the title of the purchaser. "Purchasers at Orphans' Court sales are no more responsible for a proper application of the purchase money than purchasers at any other judicial sale." *Dixcy* vs. *Laning*, 49 Pa. St., 143 (1865).

The sale in this case was not a *private* sale.

Mr. Price is of opinion that the security might by entered afterwards *nunc pro tunc* (Price on Real Estate, 139), and that no security should be required where the trustee invests in irredeemable ground rents, the trust appearing in the title deed taken, or where the deed expresses that the purchase is upon condition that the trustee should not sell or extinguish without giving security. (*Ibid*, 143.)

Agreement between two lien creditors that one of them shall not bid is void. *Barton* vs. *Benson*, 126 Pa. St., 431 (1889); unless known and assented to by the defendant and all the lien creditors. *Moffet* vs. *Ijams*, 103 Pa. St., 266 (1883).

§ 4790 Effect Upon Mortgages, of Sale.

The Act of March 23, 1867 (P. L., 44), expressly protects the lien of mortgages from being discharged "by any judicial or other sale whatsoever, whether " * * * by virtue or authority of any decree of any "Orphans' or other court, or of any writ of execution, "or otherwise, howsoever."

This act applies only to Philadelphia, Allegheny, Berks, Schuylkill, Perry and Venango.

If a sale should be made without notice of the mortgage, injustice would be done to the purchaser, and he could move to set the sale aside.

In Philadelphia, security that ten per cent. more will be offered is frequently accepted. The bidder at the first sale should be reimbursed his expenses, if any.

See chapter Sales of Real Estate.

§ 4791 Appeals.

The right of appeal is secured by the eighth section of the act above cited. It should be duly entered and notice thereof served on the vendee, mortgagee or lessee, within twenty days after the decree, otherwise a reversal will not affect the title.

The appeal is to be entered and prosecuted as in other cases of appeals from decrees of the Orphans' Court. (See chapter on Appeals to the Supreme Court, Brews. Prac., Vol. II.)

The acknowledgment and record of deeds, the death of an executor or trustee before deed made, and other matters, are provided for in the sections of the statutes already quoted.

CHAPTER XV.

PARTITION IN THE ORPHANS' COURT.

The definition of partition and the methods of procedure have been briefly referred to in the chapter on Partition by Action at Law (Brews. Prac. Vol. II). The object of the present chapter is to outline the petition for partition, filed in the Orphans' Court, and the proceedings thereon.

Jurisdiction in Partition.

§ 4792 Orphans' Court Shall Have Power to Award Inquest in Partition on Application of Widow or Lineal Descendant.

The Orphan's Court of the county where the real estate of a decedent is situate, shall have power, on the application of the widow or any lineal descendant of the decedent having an interest in such real estate, if of full age, or if under age, on the application of his guardian, to appoint seven or more disinterested persons, chosen on behalf and with consent of the parties, or when the parties cannot so agree, to award an inquest, to make partition of the real estate of such decedent, and upon the return made by the persons so appointed, or of the inquisition taken, to give judgment that the partition thereby made, be firm and stable for ever, and that the costs thereof be paid by the parties concerned. (Act March 29, 1832, §36, P. L., 201).

Instead of a Sheriff's inquisition, three or more commissioners may be appointed by the court. (Act April 27, 1855, §4, P. L., 369; Brews. Prac., Vol. II, §1948).

The Act of May 1, 1879, §1 (P. L., 40), provides that the inquisition shall consist of six men. Brews. Prac., Vol. II, §1958.

§ 4793 Widow May Have Partition—May be Made Between Her and the Only Heir, or His Alienee, or a Child if Estate Not Prejudiced.

Since the Act of March 29, 1832, the widow has a right to have partition in the Orphans' Court. *Brown's Appeal*, 84 Pa. St., 457 (1877); *Barclay* vs. *Kerr*, 110 Pa. St., 130 (1885).

Partition may be had between the widow and the only heir of an intestate, or between her and the heir's alienee. *Steel's Appeal*, 86 Pa. St., 222 (1878); or between her and a child if it can be done without prejudice to the estate. *Bishop's Appeal*, 7 W. & S., 251 (1844).

§ 4794 Widow of a Deceased Remainder-Man May Have Partition of the Original Estate.

Real estate was devised to a wife for life, and after her death to the testator's five children in fee. After the testator's death, one of his sons died intestate, leaving a widow, but no children. The testator's widow afterwards died.

Held, That the son's widow, under the Act of March 29, 1832, had a right to partition of the original estate. *Cote's Appeal*, 79 Pa. St., 235 (1875).

§ 4795 Jurisdiction in Partition Conferred Upon th Orphans' Court by the Act of 1836.

The jurisdiction of the several Orphans' Courts shall extend t and embrace—

* * * * *

V. The partition of the real estates of intestates among th heirs. * * * (Act June 16, 1836, §19, P. L., 792.)

§ 4796 Act of 1832 Does Not Vest in the Orphans Court Exclusive Jurisdiction in Partition o Estates of Intestates.

Nothing contained in the act, entitled "An act relating t "Orphans' Courts," passed on the twenty-ninth day of March 1832, shall be construed to give to the Orphans' Courts of thi Commonwealth exclusive jurisdiction in the partition and valuatio of the real estate of intestates, or to prevent any of the partie interested in such real estates from proceeding by action of parti tion in the other courts of this Commonwealth, which have juris diction of the action of partition. (Act April 21, 1846, §1, P L., 426.)

§ 4797 Jurisdiction Conferred in Cases of Testacy Where Parties Minors, or Course of Descen Not Changed.

The jurisdictions of the several Orphans' Courts of this Com monwealth, in the partition and valuation of the real estates of dece dents, shall extend to all cases of testacy, wherein the partie interested or any of them are minors, or the course of descent i not altered by the provisions of the last will and testament of th decedent; and the same proceedings shall be had thereon as i cases of intestacy, subject always, however, to the provisions of th said last will and testament, and the true intent and meaning of th testator: *Provided, however,* That nothing in this section containe shall be construed to prevent any of the parties interested in th said real estate from proceeding by action of partition, as heretc fore. (Act April 13, 1840, §4, P. L., 320.)

§ 4798 Statute Inapplicable Where Estate Given Executors to Sell.

Under the Act of 1840, the Orphans' Court may entertain proceedings for partition of estates held jointly or in common created by will, if the parties or any of them are minors.

Where the estate is given to executors to be sold, the statute does not apply. *Selfridge's Appeal*, 9 W. & S., 55 (1845).

§ 4799 Jurisdiction Vests Where Land Devised to Two or More Children, Although in Unequal Parts.

The jurisdiction of the several Orphans' Courts of this Commonwealth, in the partition and valuation of the real estates of decedents, shall extend to all cases of testacy wherein the whole or part of the real estate of the decedent may be devised to two or more children; and when such real estate is devised to two or more children, to be held and enjoyed in unequal proportions, the said court shall decree such an appropriation of the moneys arising therefrom as will best effectuate the intentions of the testator; and in all such cases in which proceedings in partition may have been had or commenced, the same shall be deemed and taken to be as regular and valid as if this act had been passed previous to the commencement of such proceedings. (Act April 10, 1849, §10, P. L., 596.)

§ 4800 Jurisdiction in Case of Birth of Child After Date of Will.

In *Cowan's Appeal*, 74 Pa. St., 329 (1873), it was held that under the Acts of April 3, 1840, and April 10, 1849, the Orphans' Court had jurisdiction in partition where a testator devised land to all his children, one of whom was born after the date of the will, and all of whom were minors at the time of the testator's death.

§ 4801 Jurisdiction in Cases of Testacy—Former Proceedings Validated.

The jurisdiction of the several Orphans' Courts of this Commonwealth, in the partition and valuation of the real estates of decedents, shall extend to all cases of testacy, without respect to the minority of the parties, their relationship to the testator, or the fact of a widow's election not to take under the will, and the proceedings in such cases shall be in the same manner and with like force and effect as is now provided by law in the partition of the real estate of persons dying intestate. (Act May 9, 1889, P. L., 146.)

That all valuations and partitions of real estate in cases of testacy made in any Orphans' Court of this Commonwealth, before the act of ninth of May, one thousand eight hundred and eighty-nine, entitled "An act to enlarge the jurisdiction of the Orphans' Courts "in cases of testacy," shall be valid and of the same effect as if the proceedings under which said valuations and partitions were made, had been commenced and instituted prior (subsequent) to the passage of said act of ninth of May, one thousand eight hundred and eighty-nine: *Provided, however,* That this act shall not affect any judicial decrees heretofore made or apply to pending litigation. (Act June 16, 1893, P. L., 464.)

§ 4802 Where Course of Descent Altered, no Jurisdiction Prior to Act of 1889.

Where a testatrix devised real estate to six of eight brothers and sisters, it was held that under the Act of April 13, 1840, the Orphans' Court had no jurisdiction, the course of descent having been altered by the will. *Vowinckel* vs. *Patterson,* 114 Pa. St., 21 (1886).

But since the passage of the Act of May 9, 1889, the question of the course of descent is no longer material, for by that act *jurisdiction is conferred in all cases of testacy.*

§ 4803 Jurisdiction Extended to Partition of Undivided Interest Held by a Decedent with Others.

The jurisdiction of the several Orphans' Courts of this Commonwealth in the partition and valuation of real estate, shall extend to any undivided interest, in fee simple, in any lands or tenements of which any person has died or shall hereafter die seised or possessed, as tenant in common or joint owner with any other person or persons, as fully as if such decedent were solely seised or possessed thereof at the time of his or her death; and the inquest, or seven men appointed to value and divide such decedent's real estate, shall value and return such interest, undivided, in all cases: and if such decedent had other real estate, such interest shall be valued and returned, either by itself, or in connection with some other portion of such decedent's real estate, valued as one of the purparts or shares into which they shall divide the whole real estate; and upon the return thereof, the proceedings shall be as in other cases. (Act March 13, 1847, §1, P. L., 319.)

Prior to the passage of this act it had been decided: (1) That an estate held by the father in common was not partable among the children before it was separated from the estate of the co-tenant, either by the act of the parties or by an action at law. *Feather* vs. *Strohoecker*, 3 P. & W., 505 (1832). (2) That the widow of an intestate, who was a tenant in common, could not maintain an action of partition in the Orphans' Court. That the Orphans' Court could only award an inquest when the tenant was *sole* seised. *Brown* vs. *Adams*, 2 Wharton, 188 (1836); and (3) That even with the other tenant's consent, the Orphans' Court could not make partition of an estate held by the intestate and such other tenant in common. *Romig's Appeal*, 8 Watts, 415 (1839).

§ 4804 Former Partitions Confirmed—Undivided Interests From Different Ancestors May be Parted in One Proceeding in Orphans' Court.

Partitions made before the date of the act to which this is a supplement, in the Orphans' Courts, and sales under proceedings in partition in said courts, within the purpose and purview of said act, and whether of one or several undivided interests derived from different ancestors, acted upon together by said courts are hereby confirmed; and hereafter several undivided interests in any premises, derived from different ancestors, by descent or devise, may be parted in one proceeding in the Orphans' Court. (Act February 26, 1869, §1, P. L., 4.)

Prior to this act it had been held that the Orphans' Court could not decree a partition, in one proceeding, of two estates, held in common by the same parties, who were the heirs of two different persons. *Snyder's Appeal*, 36 Pa. St., 166 (1860).

§ 4805 Practice in Partition Where Land Lies in Different Counties.

When the lands, in respect to which application for partition shall be made to the Orphans' Court as aforesaid, lie in one or more adjoining tracts, in different counties, it shall be lawful for the Orphans' Court of the county in which the principal mansion is situate, or if there be no mansion or building on the lands then the court of the county in which the greatest part of the land lies, on the application of any person interested, either to proceed by the appointment of seven or more men agreed on by the parties, or to issue their writ to the Sheriff of the county within the jurisdiction of the court, specifying the lands of which a partition or valuation is to be made, and thereupon the said Sheriff shall summon an inquest to divide or value the said lands, in the same manner as if the whole were within his proper bailiwick, and upon the return thereof, or upon the return of the seven or more men appointed by consent as aforesaid, the court may further proceed therein, in all respects as if all the said lands were in the proper county, and any recognisance taken in pursuance of such proceedings shall be as effectual, to all intents

and purposes, as if the lands bound by it were wholly within the county, where such recognisance is taken: *Provided*, That an exemplification of the proceedings which may be had shall within twenty days after the final decree therein, be delivered to the Clerk of the Orphans' Court of each county in which the application shall not have been made, and in which any part of the said lands are situate, which shall be entered on the records of such court at the joint expense of all parties concerned. (Act March 29, 1832, §44, P. L., 201).

See the Acts of February 20, 1854, §1 (P. L., 89); April 17, 1856, §1 (P. L., 386); March 30, 1869, §1 (P. L., 15), and May 14, 1874, §§1, 2, 3 (P. L., 156), cited at length at §§1950–1956, Brews. Prac., Vol. II.

§ 4806 Where Petition in Such Cases Should be Presented.

The petition should be presented to the Orphans' Court of the county where the decedent had his domicile, or where the homestead or greater part in value of his estate is situate. The court may then order the sale of the land as if the same were all embraced within the county where the proceedings were instituted, or may order suits in the different counties. *Phillips' Estate*, 23 W. N., 518 (1889).

§ 4807 General Decisions Upon Questions of Jurisdiction.

The decisions as to jurisdiction, when partition will lie, and when it cannot be maintained, are referred to in the chapter on Partition in the Common Pleas, Brews. Prac., Vol. II. Many of these cases are applicable to proceedings in the Orphans' Court. In addition to those authorities, the following may be mentioned:

Pending Action at Law.

It was decided in *Rex* vs. *Rex*, 3 S. & R., 533 (1817), the pendency of an action of partition at common law was no bar to proceedings in the Orphans' Court. But if the jurisdiction of the Orphans' Court first attaches, it is exclusive. *Reed* vs. *Palmer*, 53 Pa. St., 381 (1866); *R. R. Co.* vs. *Erie*, 1 Grant, 211 (1855). See *Taylor* vs. *Royal Saxon*, 1 Wallace, Jr., C. C. Rep., 311 (1849).

Decreed After Lapse of Twenty-six Years.

A partition was decreed after the lapse of twenty-six years from the death of decedent, and his descendants had been out of possession for seventeen years when the inquest was awarded. *Merklein* vs. *Trapnell*, 34 Pa. St., 42 (1859).

While Contingent Interests Outstanding.

A testator devised land in trust for two daughters for life, remainder to such children as they might leave at their death. One of the daughters died. *Held*, That the Orphans' Court had jurisdiction in partition upon petition of a son of the deceased daughter. If the land cannot be divided without injury, a sale may be had and the fund held by the trustee until the contingent interests of the children of the surviving daughter shall have become vested. *Waln's Appeal*, 4 Pa. St., 502 (1846).

May be Had by Lunatic's Committee.

The committee of a lunatic may maintain an action of partition. *Klohs* vs. *Reifsnyder*, 61 Pa. St., 240 (1869).

By Owner of Legacy Charged on Real Estate.

The owner of a legacy charged upon real estate may have partition. *Cassady's Estate*, 9 W. N., 275 (1880).

By Alienee of Heir.

One who has purchased the interest of an heir is entitled to partition. *Stewart's Appeal*, 56 Pa. St., 241 (1867).

Such purchaser succeeds to the right of election. *Thompson* vs. *Stitt*, 56 Pa. St., 157 (1867).

By the Owner of the Estates of Minor Children of an Appointee.

"The alienee" of minor children whose mother became the owner of land under an appointment by her father, in pursuance of a power conferred upon him by his wife's will, may have partition. *Rawle's Appeal*, 119 Pa. St., 100 (1888).

No Jurisdiction where Purpart Held in Severalty.

The Orphans' Court has no jurisdiction where a purpart is held by one of the parties in severalty. *Small's Appeal* (No. 1), 23 W. N., 20 (1888).

Where an heir claimed one of the purparts in severalty, it was held that the Orphans' Court could not decree partition. The fact that such heir assented to the proceedings before inquest is not material, if he objected prior to the confirmation of the partition. *Eell's Estate*, 6 Pa. St., 457 (1847).

Where Verdict Against Will, Proceedings were Stayed Until Intestacy Established by Action in Ejectment.

A testator devised a tract of land to one of several children who was in possession thereof. The Register's

Court directed an issue to try the validity of the will, and a verdict and judgment were given against the will. The contestants applied to the Orphans' Court for partition of the land. *Held*, That notwithstanding the decision against the will, the Orphans' Court, on the application of the devisee, was compelled to stay proceedings until the petitioners should establish the intestacy of the decedent, by an ejectment against the devisee who had obtained possession of the land. *Lewis* vs. *Pratt*, 2 Wharton, 81 (1836).

All the Parties Must be Interested in all the Land.

The parties to the proceedings must all be interested in all the land to be divided. The partition is void if some of the parties are interested in some part but not in another part of the land. *Small's Appeal* (No. 1), 23 W. N., 20 (1888).

Tenant for Life Enjoying Sole and Exclusive Possession Cannot Have Partition.

A tenant for life who enjoys the sole and exclusive possession of the land cannot maintain partition against remainder-men having an estate in fee, subject to the life estate. *Seiders* vs. *Giles*, 141 Pa. St., 93 (1891). See *Rankin's Appeal*, 95 Pa. St., 358 (1880).

§ 4808 What is Subject to Partition.

All real estate of which the testator or intestate dies *seised*. (See Brews. Prac., Vol. II., §1979.) Ground rents in case of intestacy go to the heir, are real estate and may be the subject of a partition. *Ingersoll* vs. *Sergeant*, 1 Wharton, 337 (1836); *Cobb* vs. *Biddle*, 14 Pa. St., 444 (1850).

Parties to the Proceedings.

§ 4809 In Partition Proceedings, all Persons Known to be Named in Petition, etc.—If Unknown, Publication to be Made.

In the proceedings for the partition and valuation of an intestate's real estate, the parties in interest shall be named in the petition, decree and notices, when known, but if it shall appear, on oath or affirmation, that the names or residences of any of the parties are unknown to the applicant for the partition, the Orphans' Court shall have power to direct such notices to be given to such parties by publication in the public newspapers, describing the parties, as far as practicable, as shall appear to the court to be reasonable and proper; and the proceedings shall be as effectual, to all intents and purposes, as if all the parties had been named in the proceedings. (Act April 14, 1835, §2, P. L., 275.)

See §1946, Brews. Prac., Vol. II. (Act of April 25, 1850, §9, to the same effect.)

§ 4810 Remainder-Men to be Made Parties in Partition—Their Rights, etc.

When the decedent leaves no lineal descendants, the like proceedings shall be had in all respects, on the application of the persons in whom the estate shall vest in possession: *Provided*, That if there be a life estate or life estates with remainders over, such remainder-men shall be made parties to the proceedings in partition, and shall have the right to accept or refuse the premises, at any valuation that may be made by seven men, appointed as aforesaid, or by an inquest, in the same manner as the lineal descendants of a decedent, such remainder-men being bound by recognizance or other sufficient security, according to the direction of the court, for the payment of the annual interest to the tenant or tenants for life; and thereupon the court shall give judgment, that the partition so made between them be and remain firm and stable forever, and that the costs thereof be paid by the parties concerned. (Act March 29, 1832, §46, P. L., 201.)

§ 4811 Share of Tenant for Life to Remain Charged on Land.

Provided always, That in the case of a sale of real estate, under proceedings in partition in the Orphans' Court, the share of any tenant for life shall not be paid to him or her, but shall remain charged on such or other real estate, according to the directions of such Orphans' Court. (Act February 24, 1834, §46, P. L., 82.)

As a general rule, no one can maintain partition who has not an estate which entitles him to immediate possession, whether legal or equitable. *Longwell* vs. *Bentley*, 23 Pa. St., 99 (1854).

It is sufficient to state briefly that in the Orphans' Court under the Acts of Assembly partition may be brought: (1) In cases of intestacy; (2) in all cases of testacy, and (3) in cases where title is derived from different ancestors by descent or devise. Therefore any party in interest under these three heads may institute the proceedings in partition. See Brews. Prac., Vol. II, §1962.

In cases of testacy, all the parties entitled under the will must be made defendants.

In cases of intestacy, all parties entitled under the intestate law should be made defendants. (See Brightly's Purdon, title "Intestates.") A brief summary may here be of assistance. The real estate of a decedent, whether male or female, shall be divided as follows (Act April 8, 1833, P. L., 316):

(I.) *If such intestate leave a widow and issue*, the widow is entitled to one-third for life. (§1.)

If such intestate leave a widow and NO *issue*, but collateral heirs or other kindred, the widow is entitled to one-half for life. (*Ibid.*)

If such intestate shall leave a husband, he is entitled to curtesy, whether there be issue or not. (*Ibid.*)

Subject to such dower interest or curtesy the real estate of such intestate shall be distributed among the issue as follows:

(*a*) *If such intestate leave children*, but no other descendant, being the issue of a deceased child, the estate shall be divided among such children. (§2.)

(*b*) *If such intestate leave grandchildren*, but no child or other descendant being the issue of a deceased grandchild, the estate shall be divided among the grandchildren. (*Ibid.*)

(*c*) *If such intestate leave descendants* in any other, but the same degree of consanguinity, however remote to him, the estate shall be divided among such descendants. (*Ibid.*)

(*d*) *If such intestate leave descendants in different degrees of consanguinity*, the more remote being the issue of a deceased child, grandchild or other descendant, each child shall receive such share as if all the children of intestate then dead, but leaving issue, had been living at the death of intestate; or, if there be no children, each grandchild shall receive such share as if all the grandchildren then dead, but leaving issue, had been alive at the death of intestate, and so, in like manner, to the remotest degree. In every case the issue of a deceased child, grandchild or other descendent, take the share their parent would have taken, if living at the death of intestate. (*Ibid.*)

(II.) *In default of issue*, and subject to the above life estate of the widow or surviving husband, if any, the real estate goes to the father and mother of intestate during their joint lives, and the life of the survivor of them, or if either be dead, the surviving parent takes a life estate. (§3.)

In default of issue, and subject to the life estates of the widow or surviving husband, father and mother, the real estate is divisible among the collateral heirs as follows :

(*a*) *If such intestate leave brothers and sisters of the whole* blood and no nephews and nieces, issue of a deceased brother or sister of the whole blood, the real estate vests in such brothers and sisters. (§4.)

(*b*) *If such intestate leave no brothers or sisters* of the whole blood, but nephews and nieces as above, the real estate vests in such nephews and nieces *per stirpes*. (*Ibid.*)

(*c*) *If such intestate leave brothers and sisters of the whole blood, and nephews and nieces*, as above, and their issue, the real estate vests in them ; the nephews and nieces taking the share which their parents would have taken if living at the death of intestate, and the grandnephews and grandnieces shall take the share which such nephews and nieces would have taken if living at the death of the intestate. (*Ibid*, and Act April 27, 1855, §2, P. L., 368.)

(*d*) *If such intestate leave neither brother nor sister of the whole blood, nor nephew or niece, nor grandnephew or grandniece*, the real estate shall vest in the next of kin, descendants of the brothers and sisters of the whole blood. (Act April 8, 1833, §4, P. L., 316 ; Act April 27, 1855, §2, P. L., 368.)

(III.) *In default of issue, and of brothers and sisters of the whole blood and their descendants*, and subject to the estates of the widow or surviving husband, the real estate vests in the mother and father of intestate, if both be living at the time of his death, or in whichever one is so living. (Act April 8, 1833, §3.)

(IV.) *In default of issue and brothers and sisters of the whole blood and their descendants, and of father and mother*, and subject to the life estates of the widow or surviving husband, the real estate vests in the brothers and sisters of the half blood and their issue, in like manner as provided in the case of brothers and sisters of the whole blood. (§6.)

(V.) *In default of all the above*, the real estate vests in the next of kin, provided that representation amongst collaterals shall not extend beyond the grandchildren of brothers and sisters and the children of uncles and aunts, and provided also that no person who is not of the blood of the ancestor from whom the real estate descends shall take an estate of inheritance. (§§7, 8 and 9, and Act April 27, 1855, §2, P. L., 368.)

If such next of kin be a grandparent, and the issue of any deceased grandparent, the law of distribution provides that the children or other descendants of the deceased grandparent shall represent such deceased grandparent and take the share he would have been entitled to if living, and the rules of succession are identical with those set forth where the original intestate leaves issue. (Act May 25, 1887, §1, P. L., 261.)

(VI.) *In default of all known heirs or kindred*, the real estate vests in the widow or surviving husband, and in default of heirs and of widow or surviving husband, the real estate vests by escheat in the Commonwealth. (Act April 8, 1833, §10, P. L., 318, and *Ibid*, §12.)

It may be further observed that the heir at common law cannot take to the exclusion of other heirs and kindred standing in the same degree of consanguinity. (Act April 8, 1833, §11, P. L., 319.)

That posthumous relatives inherit as if born in the lifetime of the intestate. (*Ibid*, §13.)

That adopting parents inherit from an adopted child as if it were the natural child, to the exclusion of its natural parents, whatever the adopted child shall have inherited from one of the adopting parents or their kindred. (Act April 13, 1887, P. L., 53.)

That an adopted child shall inherit from its adopting parents as if the lawful child and heir-at-law. (*Ibid.*)

That illegitimate children are excluded from the provisions of the Intestate Act (Act April 8, 1833, §17, P. L., 316), except that they may inherit from their mother and from each other. (Act April 27, 1855, §3, P. L., 368, and Act June 5, 1883, §1, P. L., 88).

Whenever realty shall descend to and be distributed among several persons, whether lineal or collateral heirs or kindred standing in the same degree of consanguinity to the intestate, if there shall be only one of such degree, he shall take the whole estate, and if more than one they shall take in equal shares as tenants in common. (Act June 30, 1885, §1, P. L., 251.)

§ 4812 The Petition.

All Parties in Interest to be Named.

All parties in interest should be named in the petition, decree and notice. *Ragan's Estate*, 7 Watts, 438 (1838).

Should Aver that no Other Parties Are Interested.

The petition should not only set out the names of all parties interested, but should contain a definite averment that there are no other persons interested beside those named in the petition. *Danhouse's Estate*,

130 Pa. St., 256 (1889); *Fink's Appeal*, 47 Leg. Int., 424 (1889).

§ 4813 General Directions as to Preparation of Petition.

Having satisfied yourself that the Orphans' Court has jurisdiction, and being fully acquainted with all the facts of your case, the first step will be the preparation of the petition. Consult the rules of court and the decisions as to the necessary averments of such petition. It is impossible to give forms that will cover every imaginable case. Where there is a will, the statements contained in the petition will of course differ from those used where the decedent died intestate. The following form may be used in a case where there is a will. Many of the averments are applicable to intestacy, and with a little care the form can be moulded to fit any ordinary case.

§ 4814 Form of Petition for Partition.

IN THE ORPHANS' COURT FOR THE CITY AND COUNTY OF PHILADELPHIA.

In the matter of the estate of A.S., deceased.

To the Honorable, the Judges of the said Court:

The petition of J. W. and L. W., his wife, daughter of A. S., late of the County of Philadelphia, respectfully represents:

I. That the said A. S. died on or about the , seised in his demesne as of fee of the following real estate situate in the County of Philadelphia aforesaid, to wit: (Describe separately the properties of which partition is sought and note at the foot of each description the improvements thereon.)

II. That the said A. S. left a last will dated the , by which he devised the above described real estate to his wife, , for and during the term of her natural life and from and after the death of his said wife said real estate was to be divided equally among the children of said A. S.

After the death of the said A. S., the said last will was duly admitted to probate by the Register of Wills for the County of Philadelphia and letters testamentary thereon were granted to , as executors thereof on the . A true copy of said will is hereto attached as part hereof, marked "Exhibit A."

III. That said A. S. left surviving him a widow, F. S., and three children, viz.: A. A., intermarried with B. A.; C. D., intermarried with D. D., and one of your petitioners, L. W., intermarried with J. W.

The said A. A. died on or about the , unmarried, intestate and without issue.

The said C. D. died on or about the , a widow, intestate, leaving a child surviving her, who died on or about .

(State in detail marriages, births, deaths, wills, etc. Give the names of all the parties, show how their interest was acquired. If any party be a minor, state the age and whether there is a guardian.)

IV. That by virtue of the facts above stated as well as by the provisions of the will of said A. S. and the laws of this Commonwealth, the said are each entitled to an equal part of said real estate, subject to the life estate of said widow. Said parties are all the parties and the only parties in interest in said estate and none of them have parted with their respective interests or any part thereof.

That no partition of said real estate has been made, nor can a jury for that purpose be agreed upon by the parties in interest.

Your petitioners, therefore, pray your Honorable Court to award a citation to the parties in interest to show cause why an inquest in partition should not be granted as prayed for.

And they will ever pray, etc.

(Signatures of petitioners.)

and , the foregoing petitioners, being duly sworn according to law, depose and say that the facts set forth in the above petition are true and correct to the best of their knowledge and belief.

Sworn to and subscribed before me A. D. 1887. } (Signatures of petitioners.)

(Attach copy of will.)

DECREE.

AND NOW , on consideration of the foregoing petition and on motion of , *pro* petitioner, it is ordered that the prayer of the petition be granted and a citation awarded directed to and , to show cause why an inquest to make partition as in said petition prayed for should not be granted, returnable sec. leg.

(Signature of Judge.)

It was formerly held that the widow and heirs need not be notified before an inquest in partition is awarded.

AGNEW, J.: "It would be better if the Orphans' "Court would require a rule to show cause to be issued "and served on all the parties in interest before award-"ing the inquest. Preliminary questions of jurisdic-"tion and such as relate to the parties, property and "possession could thus be settled before incurring the "expense and costs of the partition." *Horam's Estate*, 59 Pa. St., 152 (1868).

The excellence of the practice above referred to by Judge AGNEW commends itself to the careful practitioner. The petition should always pray for a citation to show cause. This is now the established and the only safe practice.

The Orphans' Court of Philadelphia have adopted the following rule:—

Petitions for partition shall conclude with a prayer for a citation to the parties in interest (whose names, and the nature and extent of their respective interests, must be fully set forth in the petition), to show cause why an inquest in partition should not be granted as prayed for. (Rule XI, §1.)

§ 4815 Where the Petition and Writ Inadvertently State that Part of the Land is in Possession of an Adverse Claimant, Such Statement May be Stricken Out After Appeal.

The petition and writ for partition contained a statement that part of the land was in possession of an adverse claimant. This was found to be a mistake, and such part was included with the remainder of the land in the partition actually made. None of the parties objected. *Held*, That such erroneous averment could be stricken out of the petition and writ by amendment, although the record had been removed by appeal to the Supreme Court. *Wistar's Appeal*, 105 Pa. St., 390. (1884).

§ 4816 General Directions as to Filing Petition.

If your petition make out a *prima facie* case, the court will award the citation.

This is served as are ordinary citations from the Orphans' Court.

If any of the respondents be minors, service must be made as required by the Act of Assembly of March 29, 1832, §53 (P. L., 207), and in case of non-residence of some of the parties, the citation must be returned with proof of such non-residence and an *alias* citation and order for publication obtained. For such minors as have no guardians, guardians *ad litem* must be appointed. See Brews. Prac., Vol. II, §1988. Consult the Orphans' Court rules and see also, as to service of citations, the chapter on History, Organization, Process, etc., and Brews. Prac., Vol. II, §§1983, 2277, 2286, 2288 and 2289.

The service upon all parties having been made, it is their duty to demur or answer to the petition or the same will be taken *pro confesso* and an inquest awarded.

§ 4817 Forms of Returns.

(Caption.)

CITY AND COUNTY OF PHILADELPHIA, *ss.* :

A. B., being duly sworn according to law, deposes and says that he served the within citation on C. D. personally at (place), on (time), by reading to him the within citation and giving him a true copy thereof (and so with the service on each defendant.)

If some of the parties in interest named in the citation cannot be found and have no known dwelling place within this Commonwealth, then add to the return :

And the other defendants named in said citation cannot be found and have no known dwelling place within this Commonwealth, and there is no surety on whom service of said citation can be made.

(Jurat.)

If there be non-resident parties in interest, then follow the directions of the Act of March 29, 1832, §53 (P. L., 207).

If the party to be cited cannot be found and have no known dwelling place within this Commonwealth, and there is no surety on which service of the citation can be made as aforesaid, and the facts shall be so stated in the return on oath or affirmation by the party complaining, or by some one competent to make affidavit in that behalf, the Orphans' Court may award another citation, returnable in like manner with the first.

At the time of awarding such second citation, the court may make an order for publication of the same in two or more newspapers, to be designated by the court, in such place or places and for such length of time as the court, having regard to the supposed place of residence of the defendant, and other circumstances, shall direct.

Form of Order Awarding alias Citation and Order of Publication.

(Caption.)

And now (date), 1892, it is ordered and decreed that an *alias* citation be awarded, directed to , to show cause why an inquest should not be awarded to make partition and valuation of the real estate of said decedent, and that notice thereof be given once a week for two weeks in the *Legal Intelligencer* and in the *Philadelphia Inquirer*, a daily newspaper published in Philadelphia, and that a copy of said daily newspaper containing the first publication of said notice be sent by mail to the last known residence of said parties.

Returnable (date).

Form of Return to Alias Citation and Order of Publication.

(Caption.)

STATE OF PENNSYLVANIA, }
CITY AND COUNTY OF PHILADELPHIA. } *ss.*

A. B., being duly sworn according to law, deposes and says that in obedience to the decree awarding an *alias* citation and order of publication of (date), notice thereof was given once a week for two weeks, in the *Legal Intelligencer*, viz: on the fifteenth and twenty-second days of July, 1893, and also once a week for two weeks in the *Philadelphia Inquirer*, a daily newspaper, published in Philadelphia, to wit: on the fourteenth and twenty-first days of July, 1893, and true copies of said advertisements are hereto attached and made part of this affidavit.

(Here follows advertisements.)

That a copy of said daily newspaper containing the first publication of said notice, to wit, the *Philadelphia Inquirer* of July 14, 1893, was sent by mail on the fourteenth day of July, 1893, to the last known residence of the following named parties, as set forth in said *alias* citation, viz:

(Here follow names and addresses.)

And that the above named parties are the parties contained in said *alias* citation.

That none of the minors, parties in interest, hereafter mentioned, have a guardian or guardians, and they do not reside in the county or within forty miles of the seat of justice of the county.

That notice of these proceedings and that application for the appointment of a guardian *ad litem* will be made at the next session of the court, viz: the first Monday of October, 1892, has been given to the following minors, over the age of fourteen, viz:

(Here follow names and adresses.)

If minors are interested, the Act of March 29, 1832, §53 (Br. Purd., 1282, §28), should be consulted.

In all cases in which proceedings may be had in the Orphans' Court affecting the interest of any minor, notice of such proceedings shall be given to the guardian of such minor, if such guardian be resident within the county or within forty miles of the seat of justice of the county, in the same manner as is herein provided for in the case of resident persons or full age; but if such minor have no guardian it shall be the duty of the party making application to the Orphans' Court to cause notice of such application to be given to the minor if above the age of fourteen years, or if under that age, to the next of kin of full age: *Provided*, Such minor or next of kin be resident within the county or within forty miles of the seat of justice thereof.

And if at the next session of the Orphans' Court application shall not have been made on the part of such minor praying for the appointment of a guardian, it shall be the duty of the court to appoint a suitable person as guardian, on whom notice shall be served in all cases in which notice shall be requisite. (*Ibid.*)

Form of Notice.

(Caption.)

To

You are hereby notified that proceedings in partition in the above case have been commenced in the Orphans' Court of Philadelphia County (State of Pennsylvania, United States of America), and if application be not made before the first Monday of October next for the appointment of a guardian, the court will appoint a suitable person as guardian *ad litem* to represent (you or said minors) in said proceedings. Very respectfully yours,

L. M.

See *Swain* vs. *Trust Co.*, 54 Pa. St., 455 (1867); *Graham's Estate*, 14 W. N., 31 (1883).

§ 4818 Form of Petition for Guardian Ad Litem.

IN THE ORPHANS' COURT OF PHILADELPHIA COUNTY.

April Term, 1892. No.

Estate of A. B., deceased.

To the Honorable, the Judges of the said Court:

The petition of C. D. respectfully represents:

I.

That A. B. died on or about the day of 1891, intestate and without issue, seised of certain real estate situate in the City and County of Philadelphia.

II.

That on the day of 1892, proceedings in partition were commenced in your Honorable Court.

III.

That your petitioner is a party in interest and one of the next of kin of said decedent.

IV.

That your petitioner is informed and believes that the following grandnephews and grandnieces of said decedent, parties in interest and next of kin of said decedent, are minors, viz.: (Here set them forth by name), as more fully appears in the petition in said partition proceedings.

V.

That said minors have no guardian or guardians.

VI.

That your petitioner on the day of , 1892, caused due and legal notice of the presentation of this application for the appointment of a guardian *ad litem*, a true copy of which is hereto attached, to be mailed at the Philadelphia Post Office, addressed to (here set forth names and addresses), minors over the age of fourteen; and to the next of kin of full age of the following-named minors under the age of fourteen, viz.: (Here set forth names, etc.)

VII.

That neither said minors over the age of fourteen, nor the next of kin on behalf of said minors under fourteen, have presented any petition for the appointment of a guardian.

Wherefore your petitioner prays your Honorable Court to appoint A. J., guardian *ad litem* for said minors, on whom notices shall be served in all cases in which notice shall be requisite.

And your petitioner will ever pray, etc.,

C. D.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA. } *ss.*

C. D., duly sworn according to law, deposes and says that the facts stated upon information and belief are true to the best of his knowledge, and the facts set forth as of his own knowledge, are true and correct.

Sworn to and subscribed before me this (date). } C. D.

[SEAL] *Notary Public.*

(Attach copy of notice.)

DECREE.

And now, to wit (date), upon consideration of the foregoing petition, and on motion of F. C., *pro* petitioner, it is ordered and decreed that A. J. be appointed guardian *ad litem* of , without security. Said guardian not to receive any property of the above-named minors, and to be allowed such compensation for his services as may hereafter be ordered by the court.

J.

§ 4819 The Answer or Demurrer.

If any of the respondents deny the right of the petitioner to partition, an answer should be filed containing such denial, in the following form;

Respondent denies that the petitioner is a tenant in common with the respondent of the premises in said petition mentioned or any part thereof, and this respondent denies the right of the said petitioner to have partition made of the said property, or any part thereof, as prayed for in the said petition. This respondent claiming to hold the real estate in said petition described, to the exclusion of the petitioner.

The respondent's title should then be briefly exhibited to the court.

Mere Denial of Right not Enough.

Mere denial of right of partition is not enough where the petition sets forth all the titles and recites that any dispute concerning them has been adjudicated. The claim of title by the adverse claimant must be justified. *Wistar's Appeal*, 115 Pa. St., 241 (1886).

Testimony May be Heard Upon the Title Asserted.

The Orphans' Court may hear testimony upon the title asserted, and if not sufficient to go to a jury, the inquest will be confirmed and the partition proceeded with. *Welch's Appeal*, 126 Pa. St., 297 (1889).

Issue May be Awarded to Try Disputed Questions of Fact.

The Orphans' Court may award an issue, under the Act of March 29, 1832, to try disputed questions of fact in partition. *Armstrong's Estate*, 10 W. N., 571 (1881).

Where Legitimacy is Involved, the Finding of the Orphans' Court is Conclusive, Except in Case of Clear Error.

The decision of the Orphans' Court, refusing an issue in partition, will not be reviewed by the Supreme Court.

When the right to demand such issue is dependent upon the petitioner's status as an heir, the finding of the Orphans' Court as to legitimacy is final, except in cases of clear error. *Kates' Estate*, 148 Pa. St., 471 (1892).

Should the petition be defective in matters of form, a demurrer may be filled.

§ 4820 Form of Demurrer.

(Caption.)

These A. B. and C. D. by protestation, not confessing or acknowledging all or any of the matters, or things in the said petition con tained to be true, in such manner and form as the same are therein set forth and alleged, demur to the said petition and for cause of demurrer show:

1. That the petition fails to aver that was seised of the real estate at his death.

2. That the petitioner does not aver who are the parties in interest in said estate and entitled to share in the partition thereof.

3. That the petitioner does not attach to his petition a copy of the will of the late , under which will the petitioner claims; that without an examination of said will, or a copy thereof, it is impossible for this Honorable Court to decide that the petitioner has any status.

4. The petition presents no case for relief. Wherefore, and for other good causes of demurrer appearing upon the face of the said petition, A. B. and C. D. demur thereto and pray the judgment of this Honorable Court whether they shall be compelled to make any answer to said petition, and pray to be hence dismissed with their reasonable costs in this behalf sustained. A. B.,

Attorney pro Demurrants.

(Affidavit that the demurrer is not interposed for delay.)

The petition and demurrer should be ordered down upon the argument list of the court, paper-books prepared and the matter disposed of before the court in banc.

While the proceedings are pending, any party claiming to be interested in the land of which partition is sought, who has not been named or served with notice, may file a

§ 4821 Petition to Intervene.

In the Orphans' Court for the County of Philadelphia.

Estate of , deceased.

Term, . No. .

The petition of A. B. respectfully represents:

That the said died on or about , seised of certain real estate situate in the County of Philadelphia.

That the said , by his last will and testament dated , devised said real estate and his personal estate to his wife , for and during the term of her natural life, and from and immediately after the death of his said wife, said real and personal estate was to be divided equally among the children of said . After the death of the said , said will was duly admitted to probate by the Register of Wills for the County of Philadelphia.

A true copy of the will is attached to this petition.

That the said left surviving him a widow , and children, viz.: intermarried with , and , intermarried with A. B., your petitioner.

The said died on or about (date), unmarried, intestate and without issue.

That the wife of your petitioner, the said E. B., died on or about (date), intestate, leaving surviving her a child, petitioner's son, who died on or about (date).

That , one of the devisees above-named, has presented a petition to your Honorable Court, praying that a citation be granted to show cause why an inquest to make partition of the real estate of said , deceased, should not be awarded.

That your petitioner has not been made a party to said proceedings for partition. He therefore prays your Honorable Court to grant a citation directed to the said and , to show cause why he should not have leave to intervene as a party to the record in the proceedings for partition of the real estate of , deceased.

And your petitioner will ever pray, etc.

(Affidavit of truth of petition.) (Signature of petitioner.)

(Attach copy of will.)

DECREE.

And now (date), upon consideration of the foregoing petition and on motion of C. D., *pro* petitioner, it is ordered and decreed that a citation be granted directed to and , to show cause why A. B. should not have leave to intervene as a party to the record in the proceedings for partition of the real estate of , deceased.

If you are entitled to an inquest, the court will make the following order :—

§ 4822 Decree Awarding Inquest.

IN THE ORPHANS' COURT OF PHILADELPHIA COUNTY.

Estate of A. S., deceased.

Term, . No. .

And now , it appearing to the court that process was duly served upon all the respondents, it is, on consideration of the petition and upon motion of A. B., *pro* petitioners, ordered and decreed that an inquest be awarded to make partition of the land in said petition mentioned between the petitioner, , and the respondents, and , according to their respective shares, as set forth in said petition, and that notice thereof be given to , widow of said , deceased.

Returnable according to law.

(Signature of Judge.)

Execution of Inquest.

See Brews. Prac., Vol. II, §2015, *et seq.*

§ 4823 Notice of Proceedings Must be Given According to Requirements of Act of Assembly.

Swain vs. *Fidelity Co.*, 54 Pa. St., 455 (1867): In a suit for specific performance, the defense alleged that the complainant, through defective service upon a minor, in partition proceedings, could not offer a good title to the premises.

AGNEW, J.: "No service was made upon any of "the minors, according to the provisions of the Act of "thirteenth June, 1836. Mr. Phillips appeared (as "the record shows), at the instance of the mother, as "the next friend of some of them. This itself was "an irregularity. An infant can appear only by guar- "dian. No guardians *ad litem* were appointed by

"the court, as the act requires. Even where service "has been duly made upon the minor under fourteen "years of age, by notice of the writ to his next of "kin, or upon the minor over fourteen by service "upon himself, yet no further proceeding can be taken "in the cause until the plaintiff has made application "to the court for the appointment of a guardian of the "minor."

Grantee of Heir Whose Deed Not Recorded, is Not Entitled to Notice.

The grantee of an heir, who has failed to record his deed, is not entitled to notice. *Merklein* vs. *Trapnell*, 34 Pa. St., 42 (1859).

Nor a Mortgagee of Undivided Interest.

The mortgagee of an undivided interest is not entitled to notice. *Stewart* vs. *Bank*, 101 Pa. St., 342 (1882).

Sheriff's Vendee of Interest of Heir Entitled to Notice.

The interest of an heir was purchased at Sheriff's sale. Another heir, present at the time of the sale, subsequently commenced proceedings in partition, but did not name or give notice to the Sheriff's vendee. The petitioner secured the land under the partition proceedings. *Held*, That the interest sold at Sheriff's sale did not pass under the partition. *Thompson* vs. *Stitt*, 56 Pa. St., 156 (1867).

In this case the court distinguished the facts there presented from the case of *Merklein* vs. *Trapnell*, 34 Pa. St., 42 (1859), relied upon by the petitioner. In the latter case the alienee had never recorded his deed,

had abandoned the purchase, paid no purchase money, and never afterwards returned to or claimed the land, and the proceedings in partition remained uncontested for thirty years.

Where all Parties are Notified of Meeting of Inquest, They Will be Presumed to Have Had Notice of an Adjournment.

Where the record shows notice to all heirs of the time of holding the inquest, but the return sets forth that the inquisition was held on a subsequent date and that "the parties in interest were severally "warned and as many as choose being present," etc., in the absence of evidence to the contrary, it will be presumed that there was due notice given of the adjourned meeting. *Welch's Appeal*, 126 Pa. St., 297 (1889).

Notice Need Not be Given Husband of an Heir Absent More Than Seven Years.

The validity of the inquest is not affected by the fact that the husband of one of the heirs, who has been absent and unheard of for more than seven years, was not named in the petition nor in the return to the inquest. *Welch's Appeal*, 126 Pa. St., 297 (1889).

Tenant by Curtesy Entitled to Notice.

Where the tenant by the curtesy was not notified of the proceedings and was not even named in the decree of the Orphans' Court, the omission was held to be fatal and the proceedings were reversed. *Walton* vs. *Willis*, 1 Dallas, 351 (1788).

The proceedings will be set aside upon the application of a life tenant who is not named in the petition and who has had no notice of the inquest. *Klingensmith's Estate*, 130 Pa. St., 516 (1889). In that case the life tenant filed exceptions to the inquisition. An auditor was appointed who reported that the exceptant should be made a party. The report was confirmed. The usual rule to accept or refuse was then issued and served upon the life tenant, who thereupon filed additional exceptions, alleging that the valuation was too low, and asking a re-valuation. It was held, that neither the confirmation of the auditor's report nor the application of the life tenant for a re-valuation was sufficient to cure the irregularity of the proceedings.

Husband of Deceased Tenant in Remainder not Entitled to Notice Where Life Tenant Living.

Hitner vs. *Ege*, 23 Pa. St., 305 (1854). The husband cannot be tenant by the curtesy of his wife's estate in reversion or remainder expectant on an estate of freehold, unless the particular estate be ended during the coverture.

Young vs. *McIntyre*, 6 W. N., 252 (1878) BIDDLE, J. (C. P.) Rule to set aside order of sale in partition.

The will, after bequeathing all testator's estate to his wife and unmarried daughters for the life of the wife, provided "that, at the decease of his wife, all "testator's estate should be equally divided among "his sons and daughters, and their heirs forever, the "daughters' shares to be free from the control of their "husbands, and in case of the death of any child before "the wife, the issue of such child should take the "parent's share."

Testator left a son, the plaintiff, and three daughters, one of whom, Emma, was married at the time of his death to John Richardson, and this daughter died before testator's wife, leaving to survive her the husband, but no issue.

The present rule was obtained by Richardson, on the ground that, as tenant by the curtesy of his wife's estate, he was entitled to be made a party to these proceedings in partition.

BIDDLE, J.: "By the common law, the seisin of "the wife must be an actual seisin or possession to "entitle the husband to an estate as tenant by the "curtesy in her lands. Hence, there could be no such "estate in lands to which she was entitled in "remainder, as in the present instance. It was not "necessary, therefore, that the name of John Richard-"son should be joined in these proceedings. *Rule dis-"charged.*"

§ 4824 Return to Inquest Should Show How Land Appraised, and Should Describe Each Purpart.

The return to the inquest should show whether the land is appraised as a whole or in purparts, and each purpart should be so described as to be easily identified. *Christy's Appeal*, 110 Pa. St., 538 (1885).

It is well for the petitioner's counsel to furnish the Sheriff's jury with proper instructions, forms and descriptions. This practice was commended in *Christy's Appeal* (*supra*).

§ 4825 The Allotments Should be Just.

An intestate died, leaving a widow, a father, a sister and brother, but no children. Under proceed-

ings in partition, the share assigned the widow was three times as valuable as that assigned to the father, although the rents of both shares were equal.

The partition was set aside for inequality. *Young* vs. *Bickel*, 1 S. & R., 467 (1815).

In case of manifest undervaluation the inquest should be set aside. *Rex* vs. *Rex*, 3 S. & R., 533 (1817).

Subsequent Appreciation of Property.

See *Klingensmith's Estate*, 130 Pa. St., 516 (1890); Brews. Prac., Vol. II, §2029.

§ 4826 Separate Estimates of Jurors do Not Invalidate Inquest.

Where the jurors made separate estimates as to the value of the land, added them together and extracted the medium value, it was held no objection to the inquisition. *White* vs. *White*, 5 Rawle, 61 (1835).

§ 4827 Nor Presence of Sheriff, if no Interference on His Part.

The presence of the Sheriff, there having been no improper interference on his part, was held not to affect the validity of the inquisition.

§ 4828 Proceedings Stayed After Inquest Because of a Will Shown, Although Verdict Had Been Against it in Ejectment.

Upon return of an inquest in partition, the widow exhibited a paper purporting to be the decedent's will, and asked that the proceedings might be set aside.

The petitioners offered the record of an ejectment by an heir of decedent against the widow, and it was said that a verdict had been recovered against the will.

The Orphans' Court refused to confirm the inquisition, one verdict not being conclusive. The Supreme Court affirmed. *Spangler* vs. *Rambler*, 4 S. & R., 192 (1818).

§ 4829 Decree of Confirmation Final.

The decree of confirmation upon return of the inquest is final, and any party interested may appeal from the same. *Christy's Appeal*, 110 Pa. St., 538 (1885).

§ 4830 Land May be Divided Into More Purparts Than There are Heirs.

Under the Act of 1832, the land may be divided into more purparts than there are heirs.

Such purparts as may be refused may be sold. *Darrah's Appeal*, 10 Pa. St., 210 (1849).

§ 4831 Where Land Equally Divided and Allotted it Need not be Appraised.

If practicable, the land should be divided into as many purparts, of equal value, as there are heirs. The purparts may then be allotted, one to each heir, and the land as a whole, or the several purparts, need not be appraised. *Wistar's Appeal*, 105 Pa. St., 390 (1884).

§ 4832 Orphans' Court May Make Partition Among Heirs Upon Return of Inquest.

The Orphans' Court, under the Act of March 29, 1832, upon return of the inquest, may at once make a complete partition of the entire estate by allotting a share to each party in the order of choice set out in section thirty-seven of said Act. And if no share shall be selected, then the court may assign such share. Payment of owelty may be ordered to be made by the parties to whom may be assigned shares subject to such owelty. *Sampson's Appeal*, 4 W. & S., 86 (1841).

§ 4833 Where Estate Cannot be Divided, Court to Award Same to Proper Parties—Rights of Respective Parties to Take.

When any such estate cannot be divided among the lineal descendants as aforesaid, or the widow and such lineal descendants, without prejudice to or spoiling the whole, the said seven or more persons, or the said inquest, as the case may be, shall make and return a just appraisement thereof to the Orphans' Court; and thereupon, but not otherwise, the said court may order the same:

I. To the eldest son, if he be living; but if he be dead, to his children, if any, in the order of their birth, and preferring males to females; and in like manner, to his other lineal descendants in the same order.

II. If the eldest son, or his lineal descendants, do not accept the same, then to the second and other sons, or their lineal descendants, successively, in the order of birth, in like manner as is provided for the eldest son and his descendants.

III. If the second or other sons, or their descendants, do not accept the same as aforesaid, then to the eldest daughter or her lineal descendants, in like manner as is provided in the case of the eldest sons.

IV. If the eldest daughter, or her lineal descendants, do not accept the same, then to the second and other daughters or their lineal descendants, successively, in like manner as is provided for the second and other sons. (Act March 29, 1832, §37, P. L., 201.)

§ 4834 Party Accepting Estate, to Secure Other Parties' Interests.

In every such case, the party accepting the same, or some one on his behalf, paying to the other parties interested their proportional parts of the value of such estate, according to the just appraisement thereof, made in manner aforesaid, or giving good security by recognizance, or otherwise, to the satisfaction of the court for the payment thereof, with legal interest, in some reasonable time, not exceeding twelve months, as the court may direct. And the persons to whom or for whose use payment or satisfaction shall be so made, in any of the cases aforesaid, for their respective parts or shares of such real estate, shall be forever barred of all right or title to the same. (Act March 29, 1832, §37, P. L., 201.)

§ 4835 Where Equal Partition Cannot be Made, Purparts to be Appraised and Awarded to Parties Entitled—Owelty.

When equal partition in value cannot be made by the seven men appointed as aforesaid, or by the said inquest, they shall make a just appraisement of the respective purparts or shares in which they may divide the estate; and thereupon the court may order the said purparts or shares successively to the persons entitled to make choice therefrom, in the order and according to the rules enacted in the preceding section, where the estate cannot conveniently be divided; and they shall award that one or more purparts or shares shall be subject to the payment of such sum or sums of money as shall be necesssary to equalize the value of the said purparts, according to the said appraisement thereof; which sum or sums of money shall be paid or secured to be paid, by the several persons accepting such purparts, in the manner prescribed in the foregoing section. (Act March 29, 1832, §38, P. L., 201.)

§ 4836 Purparts to be Appraised and Awarded to Persons Entitled.

When such estate cannot conveniently be divided into as many shares as there are parties entitled, the seven men appointed as aforesaid or the said inquest shall make a just appraisement of the respective purparts or shares into which they may divide the estate, and thereupon the court may order the shares successively to the parties entitled, to make choice therefrom, in the order and according to the rules hereinbefore provided for the case where the estate cannot conveniently be divided, they or some one in their behalf, paying or securing to be paid to the other parties interested, their respective parts of the value thereof, in the manner prescribed as aforesaid. (Act March 29, 1832, §39, P. L., 201.)

§ 4837 Rule to Accept or Refuse.

In all cases of appraisement or partition mentioned in the preceding section, the Orphans' Court shall, on application, grant a rule on all persons interested, to come into court, at a certain day by them to be fixed, to accept or refuse the estate, or a share or

portion thereof, as the case may be: and in case the party entitled to a choice do not come into court, in person, or by guardian or attorney duly constituted, or in case he shall refuse the same, a record shall be made thereof, and the court may and shall direct the same to be offered to the next in succession, according to the rules hereinbefore provided. (Act March 29, 1832, §40, P. L., 201.)

In all cases of the partition or valuation of real estate in any of the Orphans' Courts of this Commonwealth, it shall be lawful for the said courts, upon the application of the widow, or any of the heirs, of the decedent, instead of the separate rules heretofore issued in such cases, to grant a rule upon the parties interested to appear, and accept or refuse the said real estate at the valuation, or show cause why the said real estate, or any part thereof, should not be sold, in case they or any of them should neglect or refuse to take and accept the same as aforesaid. (Act April 25, 1850, §2, P. L., 569.)

§ 4838 Form of Rule to Accept or Refuse.

O. C.

Term . No. .

Estate of , deceased.

And now, , the Sheriff and jury of inquest having made return under their respective hands and seals to the writ of inquest awarded in the above estate , that the parties therein named had been severally warned, and that the property described in the said writ cannot be parted and divided between the said parties so as to accomplish and effect an equal partition in value among them, according to their respective rights and shares in the said premises, without prejudice to or spoiling the whole, and that said properties have been valued as follows:

(State valuations of properties,)

Which valuations amount in the aggregate to dollars, clear of incumbrances, and which several purparts or parcels make up all the lands and tenements in said writ of inquest described.

It is, on motion of , *pro* petitioners, ordered and decreed that the aforesaid inquest be confirmed, and that a rule be granted upon the said parties in interest, to accept or refuse to take the said properties in said inquest mentioned at the appraised value

put upon them by the aforesaid inquest, and to show cause why the said real estate should not be sold in case the said parties or any of them should neglect or refuse to take the same at the valuations aforesaid.

Rule returnable, (date).

(Signature of judge.)

§ 4839 Heir to Have Preference as to One Share Only.

In any case where one of the heirs of a decedent has elected to take the real estate of such decedent in one county, or any share thereof, if divided into shares, such heir shall not have the right of preference or election to take the real estate or any share thereof, in any other county, or any other share in the same county, until all the other heirs shall have neglected, after due notice, or refused to take the same at such valuation. (Act March 29, 1832, §45, P. L., 201.)

§ 4840 Shares of Parties Appearing may be Allotted, and Remainder of Premises may Remain Subject to Future Partition.

In all cases of partition, either in the courts of Common Pleas or in the Orphans' Courts, the courts having jurisdiction thereof are empowered, wherever it shall appear advisable and proper, to cause the share or shares of the party or parties appearing in court, to be allotted and assigned to them, and to permit the residue of the premises to remain for the person or persons entitled thereto, and subject to a future partition among them, if more than one person be so entitled. (Act April 25, 1850, §10, P. L., 571.)

§ 4841 Service of Rule to Accept or Refuse.

The rule to accept or refuse need not be served by the Sheriff, but he may be required to do so. *Horam's Estate*, 59 Pa. St., 152 (1868).

Where the Orphans' Court ordered that the rule to accept or refuse should be published in two newspapers, and the return to the rule showed that it had

been published only in one, which return was approved by the court, it was held that such approval cured the non-compliance with the order. *Sankey's Appeal*, 55 Pa. St., 491 (1867).

§ 4842 Right to Take Land at Valuation.

Issue of Eldest Son.

An intestate died, leaving sons and daughters and also grandchildren, who were the issue of the eldest son deceased in the intestate's lifetime. *Held*, That under the Act of April 19, 1794, the grandchildren were entitled to take the real estate of the intestate at its valuation in preference to the eldest son *then living*. *Hersha* vs. *Brenneman*, 6 S. & R., 2 (1820).

Alienee of Eldest Son.

The alienee of the eldest son is entitled to first choice at the appraisement. *Ragan's Estate*, 7 Watts, 438 (1838).

Life Tenant Cannot Bid Against Lineal Descendant.

A tenant for life has no right to bid for the property against a lineal descendant. *Rankin's Appeal*, 95 Pa. St., 358 (1880).

Right to Take, Lost if Heirs or Their Alienees Fail to Appear.

If the heirs or their alienees fail to appear on the return of the rule and accept the real estate at the appraisement, they lose such right. *Wentz's Appeal*, 7 Pa. St., 151 (1847).

§ 4843 Bidding for Purparts.

By Act of April 22, 1856, §10 (P. L., 534), Brews. Prac., Vol. II, §1949, the purparts are to be allotted to the parties bidding highest above the valuation. The right to take depends on the price offered. *Klohs* vs. *Reifsnyder*, 61 Pa. St., 240 (1869).

See Brews. Prac., Vol. II, §§2034–2036, as to allotments and bids.

When Land Assigned to Widow, if no Appeal, Such Defect Cannot Defeat Recovery by Her of Purchase Money.

Where land was assigned to the widow at a valuation and the time for an appeal had elapsed, it was held that the purchaser of the land could not, in an action to recover the purchase money, take advantage of such defect, although the Act of Assembly allows an assignment to *heirs* only. *Painter* vs. *Henderson*, 7 Pa. St., 48 (1847).

Confirmation to Heir not Conclusive Against Another Heir Claiming Adversely and Disputing Proceedings.

Partition proceedings by which real estate is confirmed to an heir, are not conclusive as to the question of title to such real estate, between him and another heir claiming adversely and disavowing the proceedings. *Mehaffy* vs. *Dobbs*, 9 Watts, 363 (1840).

Oral Bids Not Allowed, but Farty so Taking Cannot Object to Title of Others Obtaining Their Purparts in Like Manner.

The Act of April 22, 1856, does not allow oral bids. But where one takes part in an allotment upon oral bids and receives and retains benefits therefrom,

he cannot object to the title of others obtained in like manner. *Sutton's Appeal*, 112 Pa. St., 598 (1886).

§ 4844 When Mortgage to be Given to Protect Other Interests, Party Accepting Purpart Acquires no Title Until Such Mortgage Executed.

Where the real estate is allotted to one who is ordered to give a mortgage for the interests of the other parties, no estate vests until the mortgage is given or the money paid. *Smith* vs. *Scudder*, 11 S. & R., 325 (1824).

§ 4845 Award to One Heir Divests Title of Other Heirs.

When a decree has been entered, awarding the premises to an heir, at the valuation, the title of the other heirs, and of all claiming under them, is thereby divested. *Merklein* vs. *Trapnell*, 34 Pa. St., 42 (1859).

§ 4846 Taking by Husband.

Blocher vs. *Harmony*, 1 S. & R., 460 (1815). Where a husband, under partition proceedings, took certain land at the valuation, in right of his wife, it was held that upon the death of the husband the land belonged to the wife and could not be sold for the husband's debts.

Fogelsonger vs. *Somerville*, 6 S. & R., 267 (1820), is to the same effect. See, also, *Stoolfoos* vs. *Jenkins*, 8 S. & R., 167 (1822), and *Evans* vs. *Shearer*, 107 Pa. St., 231 (1884).

Where the Orphans' Court assigned to a husband of a female heir the entire estate, upon his paying to the other heirs their respective shares, it was held that he took all in his own right except his wife's share. *McCullough* vs. *Wallace*, 8 S. & R., 181 (1822).

See, also, upon this point, *Snevily* vs. *Wagner*, 8 Pa. St., 396 (1848).

A husband may accept as his wife's agent, and for so much as he advances as owelty beyond the interest of his wife, he secures title in his own right. *Thompson* vs. *Stitt*, 56 Pa. St., 156 (1867).

§ 4847 Share of Married Woman Not to be Paid to Her Husband Before Entry of Security by Him—The Wife May Declare That Such Husband Need Not Give Security—Form of Such Declaration.

Act March 29, 1832, §48 (P. L., 206).

§ 4848 Where Such Declaration Filed by Wife and the Parties Shall be Divorced Before Payment to the Husband, the Wife's Share to be Collectible by Her for Her Own Use.

Act April 13, 1869, §1 (P. L., 28).

Where the wife filed a declaration under the Act of March 29, 1832, that she did not require her husband to give security upon payment to him of her share, it was held that the heirs or personal representatives of the wife had no right, after her death, to claim against the husband any part of the funds secured by the recognizance given by him to the heirs, including the wife. *Gutshall* vs. *Goodyear*, 107 Pa. St., 123 (1884).

The foregoing acts, passed for the protection of married women, and many of the decisions applicable to the taking of the land by the husband, have been superseded in effect by the legislation vesting in married women the ownership of their separate property. See Acts of April 11, 1848 (P. L., 536); June 3, 1887 (P. L., 332), and June 8, 1893 (P. L., 344).

§ 4849 Setting Aside Award.

The court refused to set aside a decree awarding real estate to an heir, when the application was not made for eighteen months after the award, and no fraud had been practised upon the parties or the court. *Osborne's Estate*, 149 Pa. St., 412 (1892).

Even if the application be promptly made and accompanied by an offer to enter security that the land will bring more than the original bid, it is largely in the discretion of the court to grant the application. (*Ibid.*)

The real estate was awarded to a guardian, who, ten years before, had been appointed in violation of the Act of March 29, 1832, §6, which forbids the appointment as guardian of an executor or administrator of an estate in which the minor is interested. The other heirs objected to the award. but it was sustained by the Supreme Court. *Dull's Appeal*, 108 Pa. St., 604 (1885).

§ 4850 When Orphans' Court May Appoint Commissioners to Designate Boundaries of Curtilage, etc.

Whenever, under and by the provisions of any last will and testament, or by reservation or limitation in any deed or deeds of conveyance, or by reservation in any partition between tenants in common or coparceners, any dwelling-house or other building is devised, bequeathed, reserved or limited to any person or persons, for life, or other period of time, without defining the boundaries of the curtilage or lot appurtenant to such dwelling-house or other buildings, and necessary for the use and enjoyment of the same, it shall be lawful for any of the parties interested to apply, by petition in writing, to the Orphans' Court of the county in which said lands or buildings are situate, for the appointment of Commissioners to

designate the boundaries of the curtilage or lot appurtenant to such dwelling-house or other building, and necessary for the convenient use of the same, for the purposes for which it was intended. (Act April 14, 1868, §1, P. L., 97.)

It shall be the duty of the said court, on presentation of such petition, to appoint three competent and skillful persons, as they shall think proper, for the purposes aforesaid, who shall receive the sum of one dollar per day, for the time spent in the performance of their duties as said commissioners, (*Ibid*, §2.)

§ 4851 Duty of Curtilage Commissioners—Effect of Report—Costs.

It shall be the duty of the Commissioners so appointed, to give reasonable notice to all parties interested, of the time at which they will examine said dwelling-house or other buildings, for the purposes aforesaid, and to make report to the court in pursuance of the order to them directed; and in such report they shall sufficiently designate and describe, by metes and bounds, with their courses and distances, and by draft, if necessary, the limits and extent of ground necessary for the convenient use of such dwelling-house or other building, for the purpose for which it is designed; and such report shall, if approved by the court, be entered of record, and be conclusive on all persons concerned; and the ground thus set apart shall be exclusive property of the occupant of such dwelling-house or other building, during the full term for which it was devised, reserved or limited. (*Ibid*, §3.)

The costs of these proceedings shall be equally divided between all parties interested. (*Ibid*, §4.)

The Recognizance.

This is the means whereby the party accepting the land secures the other parties' interests, as required by §37 of the Act of 1832 (*supra*).

§4852 Where Recognizance Required for Payment of any Part of Valuation, the Clerk of the Orphans' Court Shall Make a Calculation of the Amounts Due the Respective Parties and File the Same of Record.

In all cases of partition in the Orphans' Court, where said court shall order and decree any party taking any portion of the estate at the appraisement, to give any recognizance for the payment of any part of the valuation, it shall be the duty of the Clerk of said court, in all cases in which an auditor has not been or may not be appointed by the said court, for the purpose of ascertaining advancements, making distribution among heirs and parties in interest, to make a calculation exhibiting the amounts due the respective parties in interest, and to record said calculation, when approved by the court, upon the docket of said court as a part of the proceedings in each case; for which services the Clerk shall be entitled to a fee of one dollar. (Act April 12, 1855, §1, P. L., 214.)

Where the heir-at-law took an intestate's land at the valuation, it had been the practice of the Orphans' Court throughout the State to require him to give bonds to those entitled to a distributive share of the estate.

This practice was condemned by Chief Justice M'KEAN, in *Walton* vs. *Willis*, 1 Dallas, 265 (1788):

"The Orphans' Courts ought, instead of bonds, "which are a mere personal security, to take *recog-* "*nizances*, by which the lands themselves would be "bound for the payment of the distributive shares."

Since this decision the practice has changed, and under the Act of 1832, recognizances are now entered by the heir taking at the valuation.

§4853 Court may Fix Time for Payment of Principal of Owelty.

In all cases in the Orphans' Courts in this Commonwealth, in which real estate shall be taken by an heir or other person legally authorized to take the same, charged with owelty, payable to other

heirs, or to others who hold the interest of such other heirs, the said courts shall have power to fix, for the payment of the principal of such owelty, such time or times as in the judgment of the court shall be to the advantage of those entitled to the estate: *Provided, however*, That the principal and annual payment of legal interest thereon be adequately secured. (Act May 8, 1876, §1, P. L., 140.)

§ 4854 Costs, Expenses and Trustee's Compensation May Be Ordered Paid Upon Confirmation of Sale—Purchaser to Enter Into Recognizance for Balance of Purchase-Money.

In all cases of sales of real estate in proceedings on writs of partition and valuation in the Orphans' Court, it shall and may be lawful for the court to order and decree that the costs and expenses upon said proceedings (including a reasonable compensation to the executor, administrator or trustee, by whom said sales shall be made), shall be paid, on the confirmation of such sale by the court, and the purchaser or purchasers shall enter recognizance in the Orphans' Court, with sufficient surety, to be approved of by said court, for the payment of the balance of the purchase-money to the widow and heirs, or legatees, who may be entitled to the same. (Act May 23, 1871, §1, P. L., 274.)

§ 4855 Party Suing on Such Recognizance to First Give Security Against Debts of the Decedent.

Before any suit or action shall be commenced on any recognizance entered into as aforesaid, the person or persons entitled to receive the money secured thereby shall respectively give sufficient real or personal security, to be approved of by the Orphans' Court having jurisdiction, or a Judge of said court, when the court is not in session, with condition that if any debt or demand shall be afterward recovered against the estate of decedent, or otherwise be duly made to appear, they will respectively refund the ratable part of such demand, and the costs and charges attending the recovery of the same, so far as such real estate would have been liable to such demand if it had remained unsold; but if the person or persons entitled to receive the same is or are unable to give the security aforesaid, then the money shall be put at interest, as directed in the

forty-first section of the Act of February 24, 1834, entitled, "An act relating to executors and administrators." (Act May 23, 1871, §2, P. L., 274.)

§ 4856 Such Recognizance to be a Lien Until Paid.

The recognizance aforesaid shall be a lien on the real estate so, as aforesaid, sold, until fully paid or satisfied. (*Ibid*, §3.)

§ 4857 Upon Petition, Orphans' Court May Compel Payment of Money Charged Upon Real Estate.

In all cases in which (under) a proceeding in the Orphans' Court of any county, any money has been charged upon real estate, payable at a future period, it shall be lawful for any person claiming an interest therein, when the same shall have become payable, to apply, by bill or petition, to the said Orphans' Court, for the payment of the same; whereupon, such court having caused due notice to be given to the owner of such real estate, and to such other persons as may be interested, shall proceed, according to equity, to make such decree or order for the payment of the said charge out of such real estate, as shall be just and proper. (Act May 17, 1866, §1, P. L., 1096.)

§ 4858 Petition May be Presented for Payment of Owelty.

Owelty of partition is a charge upon the real estate. The party to whom it is owing may petition the Orphans' Court and have the payment of such owelty enforced. *Neel's Appeal*, 88 Pa. St., 94 (1878).

§ 4859 When Acknowledgment of Satisfaction of Recognizance to be Entered—Its Effect.

Where a recognizance hath heretofore been, or shall hereafter be taken in any Orphans' Court, on the acceptance of the real estate of a decedent at the valuation or appraisement thereof, as hereinbefore provided for, and the same, or any part thereof, shall be satisfied or paid to the person or persons interested therein, his, her or their agent or attorneys, any such persons so having received satisfaction of the amount coming to him, shall enter an

acknowledgment thereof upon the record of such court, which shall be satisfaction and discharge of the said recognizance, to the amount acknowledged to be paid, and the recognizance shall cease to be a lien upon the real estate of the conusor to a greater amount than the principal and interest actually remaining due. (Act March 29, 1832, §50, P. L., 206.)

§ 4860 In Default of Acknowledgment of Satisfaction, Damages to be Imposed or Court to Make Order in Relief of Cognizor.

If any person who shall have received satisfaction as aforesaid, for his claim or lien secured by such recognizance, shall neglect or refuse to enter upon the record his acknowledgment thereof, upon the written request of the owner of the premises, bound by such recognizance, or of any part thereof, or of his legal representatives, or other persons interested therein, on tender of all the costs for entering such acknowledgment, within sixty days after such request and tender, as aforesaid, such person, for every such default, shall forfeit and pay to the party aggrieved the sum of fifty dollars, absolutely, and any further sum, not exceeding the amount by such person received, as shall be assessed by a jury on a trial at law, or the Orphans' Court, on due proof to them, made that the entire amount due to any heir, legatee or distributee, shall have been fully paid and discharged, may make an order for the relief of such person from any recognizance or other recorded lien; which order, being certified to the proper court where such lien may appear, shall be entered on the records, and shall inure and be received as full satisfaction and discharge of the same. (Act March 29, 1832, §51, P. L., 206.)

§ 4861 Proceedings to Obtain Satisfaction of Recognizance Where Recognizee Dead or Removed from State, the Same as in Proceedings to Obtain Satisfaction of Mortgage Upon Death of Mortgagee or his Removal From State.

The provisions of the Act of Assembly, passed the thirty-first day of March, 1823, entitled "An act relating to mortgages," shall extend and be applicable to all cases of any legacy or legacies, for the payment of which any real estate within this Commonwealth is

or may be chargeable, and to all recognizances in the Orphans' Court of any county of this Commonwealth which are or may be liens upon any real estate within the same, in as full and particular a manner as if the several provisions of said act were here repeated at length. (Act April 26, 1850, §22, P. L., 581.)

The proceedings for the discharge and satisfaction of the lien of any such legacy or legacies, or any such recognizance, shall be the same as those prescribed in the act referred to in the preceding section, in reference to the satisfaction of mortgages, except that with regard to the aforesaid recognizances, the proceedings shall be had in the Orphans' Court upon whose records the said recognizances are found. (Act April 26, 1850, §23, P. L., 581.)

§ 4862 Where Share of Real Estate Decreed to Non-Resident, Owelty to be Paid by Such Non-Resident—In Default of Payment, Land to be Sold.

In cases of partition of estates, made by any Orphans' Court, under authority of the acts relating to Orphans' Courts, and where the court shall have decreed any share or shares, to any heir or legal representative, not residing within this Commonwealth, with the payment of owelty annexed, it shall be lawful for the court, upon application made by any party lawfully interested in the same, to order a rule upon the party, his or her legal heirs or representatives, requiring the payment of said owelty, at such time and upon such terms and conditions as the court shall direct, and if the said rule cannot be served within this Commonwealth, a publication thereof, as directed by the first section of the Acts of the twenty-sixth day of March, 1808, relating to notice of partitions, shall be deemed an effectual service, and upon return and proof thereof, and upon refusal or neglect to comply with the said rule, the court may enforce the same by ordering a sale of such share or shares, for the purposes aforesaid, as in other cases of sales, under the Act of March 29, 1832. (Act April 6, 1844, §1, P. L., 214.)

§ 4863 Form of Recognizance.

The form of the recognizance is not prescribed by the Act of Assembly. Any form of a record obliga-

tion, taken before the Orphans' Court or its Clerk, is enough. *Riddle's Appeal*, 37 Pa. St., 177 (1860).

But it should follow the court's decree and clearly show the interests secured by it. *Bailey* vs. *Comm.*, 41 Pa. St., 473 (1862).

§ 4864 Need Not be Taken in Open Court nor Copied at Length on Docket.

The recognizance need not be taken in open court, nor need it be copied at length upon the court docket. *Hartman's Appeal*, 21 Pa. St., 488 (1853).

The Act of April 4, 1889, *infra*, requires the Clerk of the Orphans' Court to enter in a partition docket "all the proceedings in partition * * * from the "commencement to the final judgment and decree "thereon."

§ 4865 Defective Recognizance Cannot be Reformed to Prejudice of Surety.

A defective recognizance cannot be reformed, after the insolvency of the principal and the death of a surety, so as to increase the responsibility of the remaining surety. *Shearer's Appeal*, 96 Pa. St., 61 (1880).

§ 4866 Heir Should be Given Opportunity to Remedy Defective Recognizance.

Where the recognizance of the heir entitled to take is defective, the court should not vacate its order awarding the property to him without affording him an opportunity to execute a proper recognizance. *Gregg's Appeal*, 20 Pa. St., 148 (1852).

§ 4867 Liability of Heir Not to be Increased or Diminished After Award.

After the valuation of the estate in partition, confirmation of the inquest, and the award of the estate to an heir, the Orphans' Court has no power to make any subsequent order or decree increasing or diminishing the liability of the heir to whom the estate was awarded. *Galbraith* vs. *Galbraith*, 6 Watts, 112 (1837).

§ 4868 After Recognizance Given, Heir's Share of Realty Converted Into Personalty.

When a recognizance is given and the land adjudged to the acceptant, the heir's share of realty is converted into personalty. *Ebbs* vs. *Comm.*, 11 Pa. St., 374 (1849).

Whether such heir be a *feme covert*, minor or otherwise. *Spangler's Appeal*, 24 Pa. St., 424 (1855).

§ 4869 Suit on Several Recognizances When Land Taken Jointly.

Where three of the parties accepted the land jointly, but gave their several, instead of joint recognizance, and the cognizees are satisfied, the defendant to a *sci. fa. sur* recognizance cannot defeat a recovery upon such grounds. *Ebbs* vs. *Comm.*, 11 Pa. St., 374 (1849).

§ 4870 Recognizance May be Given to Secure Widow's Interest.

Under the Act of March 23, 1764, a recognizance may be given to secure the interest of a widow. *Good* vs. *Good*, 7 Watts, 195 (1838).

§ 4871 **The Recognizance is a First Lien and Binds the Entire Estate of the Heir Giving It.**

Owelty of partition is a first lien on the purpart of the former tenant in common, and is prior to a mortgage upon his undivided interest given before partition. *McCandless' Appeal*, 98 Pa. St., 489 (1881); *Banks' Appeal*, 99 Id., 148 (1882).

The recognizance to secure payment of the owelty is a lien upon the entire estate of the heir giving the recognizance, including the interest passing to him by descent. *Snively's Estate*, 129 Pa. St., 250 (1889).

Notwithstanding such heir is a married woman. (*Ibid.*)

Recognizance is in Nature of a Judgment.

A recognizance in the Orphans' Court for the distributive share of an heir, is in the nature of a judgment against the land. *Beatty* vs. *Smith*, 4 Yeates, 102 (1804).

It is a Lien from its Date.

Such recognizance is a lien from its date. *Kean* vs. *Franklin*, 5 S. & R., 147 (1819).

Not a Lien Upon the Land of a Surety.

It is a lien only upon the land of the intestate, and not upon the land of a surety in the recognizance. *Allen* vs. *Reesor*, 16 S. & R., 10 (1827).

It Binds the Whole Estate Taken—Not Discharged by Judicial Sale, When Taken to Secure the Widow's Interest.

It binds the whole estate taken by the purchaser giving the recognizance, and not merely the undivided interests of such heirs as have not been paid their

shares. *Cubbage* vs. *Nesmith*, 3 Watts, 314 (1834); *McCandless' Appeal*, 98 Pa. St., 489 (1881); *Snively's Estate*, 129 Pa. St., 250 (1889).

A judicial sale of land does not divest the lien of the recognizance to secure the widow's interest. *Mentzer* vs. *Menor*, 8 Watts, 296 (1839).

As to the Character of the Widow's Interest Secured by the Recognizance.

The charge in favor of the widow and heirs was held to be in lien in *Kurtz's Appeal*, 26 Pa. St., 465 (1856).

KNOX, J.: "The character of a widow's interest in "the real estate of her deceased husband, after its "allotment or sale under proceedings in partition in "the Orphans' Court, has frequently been the subject "of judicial decision by the court. We are not aware, "however, that the precise question now presented "has ever been passed upon. It is this: Where lands "are sold by virtue of proceedings in partition, and "the one-third part of the purchase money charged "upon the estate, the interest of which to be paid "to the widow during her life, and at her death the "principal to be paid to the heirs of her deceased "husband, will a judicial sale of the land, upon a judg- "ment against the purchaser, discharge the lien of a "mortgage given by him, and which mortgage is prior "to all other liens, except the charge in favor of the "widow and heirs? That the widow's interest is real "estate is well settled by repeated decisions. In "*Shoupe* vs. *Shoupe*, 12 S. & R., 9, it was declared to "be the subject of levy and sale upon an execution. "And in *Miller* vs. *Leidy*, 3 W. & S., 456, it was held

"to be an incorporeal hereditament in the nature of a "rent charge, and subject to the control of a husband "only as real estate. But it has likewise often been "treated as a lien upon the land charged with its pay- "ment. In *Medlar and another* vs. *Aulenbach and* "*Wife*, 2 Pa. Rep., 355, it was said by Mr. Justice "ROGERS to be a statutory lien in favor of the widow "for the annual interest, and in favor of the heir of "the intestate for the principal sum upon the widow's "death. *Mentzer* vs. *Menor*, 8 Watts, 296, declares "the lien of a recognizance given for the widow's "interest to remain in full force after a judicial sale, "as the property of a son who had taken the estate at "the appraisement. And in *Hill* vs. *Geiger*, 7 W. & "S., 273, it was held that the lien was created by "virtue of the order to sell, independent of a mort- "gage or other security which might be taken to "secure the unpaid purchase money, and that upon "the death of the widow, neither the purchaser nor his "alienee could legally pay the principal to the admin- "trator by whom the sale had been made, and to "whom a bond and mortgage had been given. But "whatever doubt there may be as to the nature of the "widow's estate, it is certain that, so far as relates to "the principal sum, it is simply a charge upon the "land in the nature of a lien, payable at the widow's "death to the heirs of the intestate, to be recovered "as personal only." The lien of the mortgage was held to be divested.

In *Ziegler's Appeal*, 35 Pa. St., 173 (1860), an opposite ruling was made, Judge WOODWARD distinguishing the case of *Kurtz's Appeal* (*supra*), as not having been decided under the Act of 1794, and therefore not applicable.

And in *Schall's Appeal*, 40 Pa. St., 170 (1861), it was held that the widow's interest was not a *lien upon the land*, but an *interest in it.*

Recognizance a Lien, Although Not Indexed.

The recognizance is a lien upon the land accepted as against subsequent mortgagees and purchasers, although such recognizance is not indexed in any book kept for that purpose.

The Act of April 22, 1856, which requires judgments, *sci. fas.*, recognizances and executions to be entered in "a book to be called the Judgment Index," does not apply to Orphans' Court recognizances in partition. Such recognizance is directly in the line of title. *Holmans' Appeal*, 106 Pa. St., 502 (1884).

A Continuing Lien.

The lien of the recognizance is a *continuing* lien. It requires no revival and subject to the presumption of payment after twenty years, is of indefinite duration. *Leibert's Appeal*, 119 Pa. St., 517 (1888).

Where the heir to whom the land was awarded gave a recognizance to secure the widow's interest and the principal after her death to the heirs of the decedent, "including the recognizor," the share of said heir in such principal merged in his title to the land and did not become a lien thereon. *Hollenberger* vs. *Yankey*, 145 Pa. St., 179 (1891).

§4872 Guardian May Accept Purpart for His Ward and Give a Recognizance.

A guardian may accept for his ward a purpart of the land at its appraised value, and may enter into a recognizance for the payment of the interests of other parties in the purpart so accepted. *Gelbach's Appeal*, 8 S. & R., 205 (1822).

§ 4873 Rights of Widow in Partition Proceedings—Share to Remain Charged on Land.

Should the widow of the decedent be living at the time of the partition, she shall not be entitled to payment of the sum at which her purpart or share of the estate shall be valued, but the same, together with interest thereof, shall be and remain charged upon the premises, if the whole be taken by one child or other descendant of the deceased, or upon the respective shares, if divided as hereinbefore mentioned, and the legal interest thereof shall be annually and regularly paid by the persons to whom such real estate shall be adjudged, their heirs or assigns, holding the same, according to their respective portions, to the said widow, during her natural life, in lieu and full satisfaction of her dower at common law, and the same may be recovered by the widow, by distress or otherwise, as rents in this Commonwealth are recoverable. On the death of the widow, the said principal sum shall be paid by the children, or other lineal descendants to whom the said real estate shall have been adjudged, their heirs or assigns, holding the premises, to the persons thereunto legally entitled. (Act March 29, 1832, §41, P. L., 202.)

§ 4874 Widow's Interest in Deceased Husband's Land Held by Him as Tenant in Common or Coparcener—Inquest to be Awarded—Share of Widow to be Secured—Interest to be Paid—How Interest Secured and Paid.

In all cases in which the widow of an intestate now is, or hereafter shall be entitled, under the intestate laws, to a share of, or interest in the real estate of her deceased husband, to which he was entitled at the time of his death, in common or in coparcenery with any other person or persons, if the co-tenants of the estate shall fail to make or obtain partition among themselves, so as to set out in severalty the portion appertaining to the intestate's estate, within one year after this act; and in all future cases, within one year after the estate of the intestate shall come to the possession of his representatives, the several Orphans' Courts in this Commonwealth shall have authority, on the application of the widow, to call before them all parties having interest in the premises, and to order an inquest to value the share or interest of the widow in the same, having refer-

ence to the intestate's purpart ; and upon return of the said inquest, and confirmation thereof, the said valuation and the interest thereof shall be and remain charged upon the premises, until partition shall be made as aforesaid ; and the legal interest shall be annually and regularly paid to the said widow, until such partition, during her natural life, by the person or persons holding such real estate, and may be recovered by distress or otherwise, in like manner as in the case of a widow's share or purpart, charged upon real estate upon a partition in the Orphans' Court. And when partition of the said estate shall be thereafter made, so as to set out in severalty the part or share appertaining to the said intestate's estate, the said Orphans' Court, on the application of the widow or any person concerned, shall have authority, by their decree, to charge the said valuation, in such manner as they shall deem just and equitable, upon the part or parts of the premises allotted in severalty, which appertained to the intestate's estate, and to discharge all other parts of the premises therefrom ; and the said charge shall thereafter have the like force or effect upon the share of the estate which appertained to the intestate, and upon the holders thereof, and shall be payable and recoverable in like manner during the natural life of the widow, as if the said valuation had been charged upon the said real estate upon a partition in the Orphans' Court. And in all cases in which any partition among such co-tenants shall result in a sale, the share and interest of the said widow in the money arising from such sale, shall be entitled to the same protection as the share of intestates' widows is now entitled to by law. (Act April 24, 1843, §8, P. L., 360.)

§ 4875 Widow's Interest May be Charged on One or More Purparts.

When the real estate of any decedent shall consist of several different tracts or pieces of land, and the same shall be adjudged to any of the parties entitled thereto, or ordered to be sold, by any of the Orphans' Courts of this Commonwealth, such court shall have authority to decree that the share or purpart of the widow of such decedent in the whole of said real estate, together with the interest thereof, shall be and remain charged on one or more of the said tracts or pieces of land, in the manner and for the purposes now provided by law, and that the remaining tracts or pieces of land

shall be wholly discharged from the share or purpart of such widow, or any part thereof: *Provided*, That the pieces or tracts of land, upon which such purpart or share shall be so charged as aforesaid, shall, in the opinion of such court, be fully sufficient to secure the payment of the principal and interest of such purpart or share: *And provided, further*, That such widow, and the parties entitled to such purpart or share, at her death, shall have the same remedies for enforcing and recovering their respective interests in the same, as they now have by law. (Act January 7, 1867, §1, P. L., 1367.)

§ 4876 Commissioners May be Appointed in York and Fayette Counties to Value Widow's Dower.

The Orphans' Court of York and Fayette counties shall have power, in all cases of testacy, on the petition of the widow, if living, or in case of her death subsequent to that of her husband, on the petition of her personal representative, to appoint three commissioners, or to award an inquest in their discretion, for the purpose of making partition or valuation, as the case may require, of the dower of the widow in the real estate of such deceased husband; and the said court shall have power to make such decree thereon as shall secure the interest of such widow, or her representative, in the premises, as to law and equity may appertain. (Act February 13, 1867, §1, P. L., 160.)

§ 4877 Widow's Share of Purchase Money May Remain in Hands of Purchaser—Interest to be Paid, to be Recovered by Distress, etc.

When a decree for the sale of real estate shall be made by the Orphans' Court, in the event provided for in the preceding section, the court shall direct that the share of the widow, if there be one, of the purchase money shall remain in the hands of the purchaser during the natural life of the widow, and the interest thereof shall be annually and regularly paid to her by the purchaser, his heirs and assigns, holding the premises, to be recovered by distress or otherwise as rents are recoverable in this Commonwealth, which the said widow shall accept in full satisfaction of her dower in such premises; and at her decease her share of the purchase money shall be paid to the persons legally entitled thereto. (Act March 29, 1832, §43, P. L., 203.)

§ 4878 Widow Electing to Take Against Her Husband's Will is Entitled to Same Share in His Estate as if He Had Died Intestate.

In case any person has died, or shall hereafter die, leaving a widow and last will and testament, and such widow shall elect not to take under the will, in lieu of dower at the common law, as heretofore, she shall be entitled to such interest in the real estate of her deceased husband as the widows of decedents dying intestate are entitled to under the existing laws of this Commonwealth. (Act April 20, 1869, §1, P. L., 77.)

§ 4879 Where Widow Elects to Take Against the Will, the Orphans' Court May Make Partition on Her Application, or on the Petition of Any Party Interested.

The Orphans' Courts of the several counties of this Commonwealth in which the real estate of such decedent is situated shall have power, on the application of the widow or any one interested, to award an inquest to make partition of the same, and to decree the allotments thereof made, or in case of refusal to accept, to order a sale thereof, and secure the interest of the widow and all others interested, in the same manner and with like force and effect as is now provided by law in the partition of the real estate of persons dying intestate. (Ibid, §2.)

A widow who refused to take under her husband's will, petitioned the Orphans' Court in 1867, for partition to set out her dower. After an inquest had been awarded, the executor applied for and obtained a stay of proceedings in order that he might sell for payment of debts. He obtained an order for that purpose, but never sold. The widow, in 1870, presented another petition, in which she recited all former proceedings and prayed the court to revoke the stay of proceedings in partition. *Held*, that under the Act of 1869, the court had jurisdiction to proceed, although there was no assent of the parties interested,

the petition of 1870 being treated as a petition *de novo* in order to bring the proceedings within the Act of 1869. *Neeld's Appeal*, 70 Pa. St., 113 (1871).

§4880 Widow's Interest Should be Secured by Orphans' Court Decree.

The interest of the widow should be secured by the decree of the Orphans' Court. *Gidding's Appeal*, *81 Pa. St., 72 (1871).

§4881 Payment May be Enforced by Distress.

The widow of a deceased heir may enforce payment of her interest charged upon a purpart in partition proceedings, by warrant of distress, under the Act of March 29, 1832, §41. *Baker* vs. *Leibert*, 125 Pa. St., 106 (1889).

PAXSON, J.: "Where the dower of the widow is "lawfully assigned or secured to her, whether by the "Orphans' Court, the Court of Common Pleas, or by "the agreement of the parties in interest, the dower or "annual interest due the widow, may be recovered by "distress. *Murphy* vs. *Borland*, 92 Pa. St., 89; *Bor-* "*land* vs. *Murphy*, 4 W. N., 472; *Evans* vs. *Ross*, 107 "Pa. St., 231."

§4882 Widow's Right to Mansion-House.

The widow has the right to have her one-half, including the mansion-house, set apart to her, if it can be done without prejudice to the rest, although the remainder cannot, without prejudice, be actually divided among the other heirs. The share of the widow may be confirmed to her, prior to the final adjustment of the rights of the heirs to the other half of the land. *Poundstone* vs. *Everly*, 31 Pa. St., 11 (1854).

Where there are a widow and collateral heirs only, and the estate cannot be divided and is not taken at the appraisement, it may be sold. The Act of 1833, providing that where there are none except collateral heirs, the widow shall take the mansion-house, applies to cases of actual partition only. *Poundstone* vs. *Everly* (*supra*), was said to have not been well considered. *McCall's Appeal*, 56 Pa. St., 363 (1867).

§ 4883 Widow's Interest Remains a Lien, Though Not Specially Charged by Order of the Court.

The widow's interest, though not specially charged by order of the court, remains a lien upon the land, and where the premises were conveyed by the heirs and subsequently sold at Sheriff's sale under an execution against the grantee, it was held that the purchaser at the Sheriff's sale must pay the widow's share in addition to the amount of his bid. The arrears of interest were held payable from the proceeds of the Sheriff's sale. *Kline* vs. *Bowman*, 19 Pa. St., 24 (1852); *Shertzer* vs. *Herr*, Id., 34 (1852); *Dickinson* vs. *Beyer*, 87 Id., 274 (1878).

The widow's interest is an estate in the land. It cannot be divested, except with her consent, in such way as to pass her estate. *Diefenderfer* vs. *Eshelman*, 113 Pa. St., 305 (1886).

§ 4884 Land Cannot be Assigned Free from its Charge.

The court has no power to assign the land to the party taking it, or to a purchaser, free from the charge of the widow's interest. *Karstein* vs. *Bauer*, 4 Penny., 366 (1884).

§ 4885 Lien of Judgment to Secure Dower Interest is Not Discharged by Sheriff's Sale.

The lien of a judgment, given to secure the dower interest, is not discharged by a Sheriff's sale upon a *vend. ex.* for arrears of interest. *Tospon* vs. *Sipe*, 116 Pa. St., 588 (1887).

§ 4886 Purpart Taken at Valuation is Subject to Widow's Interest and to Payment of Other Heirs' Shares of Principal at Her Death.

A son accepting land of the father at a valuation, holds it subject to the widow's interest and to the payment of the shares of the other children in the principal at her death. *Reigle* vs. *Seiger*, 2 P. & W., 340 (1831).

§ 4887 In Such Case, the Heir Accepting Has No Interest in Principal at Widow's Death.

In *Steckel* vs. *Koons*, 102 Pa. St., 493 (1883), an estate was divided by partition proceedings in two parts, charged with the dower interest of the wife of decedent, to be paid to her for life and on her death to her two children, each of whom had accepted a purpart under the partition. Then one heir conveyed to the other his purpart, subject to said dower interest, but without reservation as to the principal, and it was held, the vendor and vendee in the principal sum so charged were paid by operation of law.

§ 4888 Principal Divisible Among Heirs Only When Land Divided Into Less Parts Than There Are Heirs.

Where in partition proceedings, under the Act of 1807, each heir takes his purpart, subject to a *pro rata*

share of the widow's dower, no heir has any claim upon another, upon the widow's death, for any part of the principal of the widow's share.

The act providing for a distribution of the principal among the heirs, after the widow's death, applies only where the land is divided into less parts than there are heirs. *Williams* vs. *White*, 35 Pa. St., 514 (1860).

§ 4889 Where Widow's Death Occurs Between Levy and Sale of the Land Charged, Lien is Discharged.

Where land charged with the widow's third was levied upon, and the death of the widow occurred between the levy and the sale, it was decided that the Sheriff's vendee took the land discharged of the lien. *Riddle's Appeal*, 37 Pa. St., 177 (1860).

§ 4890 Sale of the Land.

Where none of the parties accept the land at its valuation, or any purpart thereof be refused, it is necessary to obtain an order for sale.

§ 4891 Upon Neglect or Refusal of Parties to Take at the Valuation, Rule to Show Cause Why Land Should Not be Sold Shall be Granted —To be Returnable as Court May Direct.

Upon an appraisement or valuation of real estate made as is hereinbefore provided, should all the heirs neglect, after due notice, or refuse to take the same at the valuation, the court shall, on the application of any one of the heirs, grant a rule upon the other heirs and others interested, to show cause why the estate so appraised should not be sold ; which rule shall be returnable at the next regular session of the court, or at such subsequent period as the court, having respect to the circumstances of the case, may

direct; and notice of such rule shall be given in the manner provided in this act for other notices to heirs; on the return of such rule, the court may, on due proof of notice to all persons interested, make a decree authorizing and requiring the executor or administrator, as the case may be, to expose such real estate to public sale, at such time and place, and on such terms as the court may decree: *Provided*, That the rule to show cause herein directed may be dispensed with by the court, on the application of all the heirs if of full age, and of the guardians of such as are minors, for such decree, and notice of such sale shall be given by the executor or administrator, in the manner provided in this act for other notices of sale. (Act March 29, 1832, §42, P. L., 203.)

§ 4892 Upon Refusal of Parties to Take, the Court May Order the Real Estate to be Sold.

When, upon any proceedings in an Orphans' Court, an appraisement or partition of real estate is made by an inquest of seven or more persons appointed by the court, the said court shall, upon the refusal of any of the heirs or parties interested to accept any part of the same at the valuation thereof, or if after due notice they shall neglect to appear and accept the same, make a decree authorizing and requiring the executor or administrator, or other person, as the case may be, to expose such parts of the real estate not accepted as aforesaid, to be sold agreeably to the provisions of the Act of Assembly passed the twenty-ninth of March, 1832. (Act April 15, 1845, §1, P. L., 458.)

§ 4893 Form of Order of Sale.

O. C.

Term, . No. .

Estate of , deceased.

Sur rule upon the parties in interest to accept or refuse to take the properties at the valuation put upon them by the inquest, or show cause why the said real estate should not be sold in case said parties should neglect or refuse to take the same at the valuations aforesaid.

And now (date), it appearing to the court that due notice of the above rule was given to all parties in interest, to wit: and , who are all the parties to the original petition, and the said parties not appearing in answer to the said rule, and no cause being shown against a sale,

It is, on motion of A. B., *pro* petitioners, ordered and decreed that , surviving executor of , deceased, expose the said real estate, from time to time, to public sale in the , and that he sell the same, subject to the confirmation of the court, upon the following terms, to wit: one hundred dollars to be paid in cash on each property when struck off, and the balance of the purchase money to be paid upon the confirmation of the sale by the court, and the execution and delivery by the said executor of the deed therefor.

Notice of said sale to be given according to the directions of the statutes in such case made and provided.

And it is further ordered that said sales shall be clear and discharged of all claim by any of the parties to these proceedings.

All parties to be at liberty to apply to the court, as occasion shall require.

If there be a widow, the order of sale in Philadelphia must contain a condition in compliance with the rule of the Orphans' Court.

§ 4894 The Orphans' Court of Philadelphia Has Adopted the Following Rule as to the Widow's Share.

Decrees for the sale of real estate in partition shall in all cases be subject to the provisions of the Act of Assembly of March 29, 1832, §43, relative to the share of the widow, if there be one, taking under the intestate law; and the order of sale shall set forth, in accordance with said act, that "the share of the widow, "if there be one, of the purchase money, shall remain in the hands "of the purchaser during the natural life of the widow, and the "interest thereof shall be annually and regularly paid to her by the "purchaser, his heirs and assigns, holding the premises, to be "recovered by distress or otherwise, as rents are recoverable in this "Commonwealth, which the said widow shall accept in full satis-"faction of her dower in such premises; and at her decease, her

"share of the purchase money shall be paid to the persons legally "entitled thereto;" and it shall be the duty of the Clerk to see that this rule is complied with. (Rule 11, §2.)

§ 4895 Land Cannot be Sold Until All the Heirs Refuse to Take.

The Orphans' Court cannot direct a sale of real estate which has been appraised, until all the heirs have refused or neglected to take the same at its valuation. *Gregg's Appeal*, 20 Pa. St., 148 (1852). See Brews. Prac., Vol. II, §§2042, 2043.

§ 4896 Trustee to be Appointed to Execute Order of Sale, Where There is no Administrator or Executor, or the Latter Refuses to Act.

Whenever any real estate shall be ordered to be so sold under proceedings in partition, the Orphans' Courts are hereby authorized and required, in case of the neglect or refusal of the executor or administrator to execute such order, or in case there be no executor or administrator, to appoint some suitable person trustee for the purpose of making such sale; who shall be subject to the same restrictions, and have the same powers, and whose proceedings shall have the same effect, to all intents and purpose, as are provided in the case of such sales by executors or administrators. (Act February 24, 1834, §44, P. L., 81.)

§ 4897 Form of Petition for Appointment of Trustee, Upon Refusal of Executor or Administrator to Act.

IN THE ORPHANS' COURT OF PHILADELPHIA COUNTY.

Term, . No. .

In the matter of the estate of A. S., deceased.

To the Honorable, the Judges of said Court:

The petition of and respectfully represents:

I. That your petitioners have instituted proceedings in partition in the above estate.

II. That , your Honorable Court, upon the return of the rule to accept or refuse, awarded an order of sale directed to the surviving executor of said estate.

III. That the said executor, by a writing hereto attached marked "A," has refused to execute such order.

Wherefore, your petitioners pray your Honorable Court to appoint , trustee for the purpose of making such sale.

And your petitioners will ever pray, etc.

(Signed) J. W.
L. W.

(Affidavit.)

DECREE.

And now, , on consideration of the foregoing petition and on motion of A. B., *pro* petitioner, it is ordered and decreed that the prayer of the petition be granted and that be appointed trustee for the purpose of making sale of said real estate. Said trustee to be subject to the same restrictions and to have the same powers, and the proceedings to have the same effect, to all intents and purposes, as if made by said surviving executor.

Return of sale to be made to the court for confirmation.

"A."

PHILADELPHIA (date).

O. C.

Term, . No. .

Estate of , deceased.

I refuse to execute the order of sale in the above estate.

(Signed) C. P.
Executor.

Witness.

§ 4898 Stranger Should Not be Appointed Unless Cause Exists for Not Appointing Executor or Administrator.

In *Neeld's Appeal*, 70 Pa. St., 113 (1871), the Orphans' Court appointed a stranger as trustee to make sale in partition. *Held*, That the court had discretion to make the appointment, notwithstanding there was an executor, it not appearing on the record

that there was a gross and palpable abuse of such discretion. *Pyle's Appeal*, 1 Penny., 71 (1881), is to the same effect.

In *Taylor's Appeal*, 119 Pa. St., 297 (1888), it was held that the appointment of a stranger, there being an executor who appeared in court and tendered security, was a disregard of the provisions of the statute, no reason being shown why the executor should not be appointed.

§ 4899 When Sale to be Made by Administrator d. b. n. c. t. a.

Where a wife, the owner of the land, devised the same to her husband's appointees, it was held that the order of sale should be executed by the administrator d. b. n. c. t. a. of the wife, and not by the husband's executor. *Rawle's Appeal*, 119 Pa. St., 100 (1888).

§ 4900 Real Estate Sold After Two Years From Grant of Letters, Not to be Liable for Decedent's Debts.

Whenever the real estate of a decedent, or any part thereof, shall be sold by an executor or administrator, by virtue of an order of an Orphans' Court having jurisdiction, under proceedings in partition, such real estate shall not be liable, in the hands of the purchaser, to the debts of the decedent, provided such sale be made after the expiration of two years from the granting of letters testamentary or of administration. (Act February 24, 1834, §42, P. L., 81.)

See, also, Act June 8, 1893 (P. L., 392).

Land of a decedent which had previously been adjudged to an heir under partition proceedings, was sold under an order of the Orphans' Court for the payment of the decedent's debts. *Held*, That the title of the purchaser at the sale was superior to that

of the heir; the lien of debts remaining when the land was sold. *Dresher* vs. *Water Co.*, 52 Pa. St., 225 (1866.)

§ 4901 Title of Purchaser at Bona Fide Sale Not to be Affected by Subsequent Revocation of Letters Testamentary or of Administration.

In all cases of *bona fide* sales under the order of and confirmed by the Orphans' Court, the title of the purchaser shall not be affected by the subsequent revocation of the letters testamentary or of administration of the executor or administrator making such sales, and purchasers of real estate sold under orders of the Orphans' Court shall, after the confirmation of the sale and the execution and acknowledgment of the deed, have a right to proceed to obtain possession of the purchased premises, in the same manner as is now provided in relation to purchasers at Sheriff's sales. (Act April 9, 1849, §16, P. L., 527.)

§ 4902 Where Trustee Dies After Sale, but Before Execution of Deed, the Same to be Executed by the Administrator of the Decedent or of the Trustee, or by Clerk of Orphans' Court.

In all cases of sales heretofore made, as well as in all cases of sales hereafter made, by a trustee appointed by the Orphans' Court of any county within this Commonwealth, to make sale of real estate, after proceedings in partition, and where such sales have or shall be held under such order, and the said trustee shall be removed by the court, or has or shall die, or become insane, or otherwise incapable of acting, before a conveyance is made to the purchaser; on the purchaser, or the succeeding administrator of such decedent, or on the administrator of such trustee petitioning the court, it shall be lawful for the administrator of the decedent whose estate was sold, or for the administrator of the trustee, after giving security, to be approved of by the said court, for the faithful appropriation of the proceeds of such sale, to execute and deliver to the purchaser a deed of con-

veyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale; but if, within three months, there be no succeeding administrator or administrators of such trustee, having given security as aforesaid, it shall be the duty of the Orphans' Court, on the petition of the purchaser, to direct the Clerk of the Orphans' Court to execute and deliver to the purchaser the necessary deed of conveyance on his full compliance with the terms and conditions of sale, paying into court the moneys payable, and delivering to the Clerk the securities required by said terms and conditions, which moneys and securities shall remain subject to the disposition of the court. Every deed made in pursuance of and agreeably to the provisions of this act, shall vest the property therein described in the grantee, as fully and effectually as if the same had been made by the persons who may have sold any such estate circumstanced as aforesaid. (Act April 9, 1849, §4, P. L., 525.)

§ 4903 Form of Petition of Trustee for Leave to Bid at Sale.

Should the trustee desire to bid upon the property, he should present the following:

Petition for Leave to Bid.

IN THE ORPHANS' COURT OF PHILADELPHIA COUNTY.

Term, . No. 100.

In the matter of the estate of A. S., deceased.

To the Honorable, the Judges of the said Court:

The petition of F. S. respectfully represents:

I. That proceedings in partition have been instituted in the above estate.

II. That your Honorable Court, upon the return of the rule to accept or refuse, awarded an order of sale, directed to the surviving executor of said estate.

III. That the said executor refused to execute such order.

IV. That your petitioner was thereupon appointed trustee for the purpose of making such sale.

V. That your petitioner is the widow of said A. S., deceased.

VI. That your petitioner is desirous of bidding at said sale and of entering into competition with such other persons who may bid at said sale for the properties Nos. and , Street, Philadelphia, said properties being a portion of the real estate of said decedent to be sold at said sale.

VII. That the other heirs of the said A. S. are aware of your petitioner's wish to bid as aforesaid and are willing that such authority may be given to her.

VIII. Wherefore, your petitioner prays your Honorable Court that permission be given her to bid as aforesaid.

And your petitioner will ever pray, etc.

(Signature of petitioner.)

CITY AND COUNTY OF PHILADELPHIA, *ss.:*

F. S., the above petitioner, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true and correct.

Sworn to and subscribed before me, A. D. 1888. } (Signature of petitioner.)

DECREE.

And now, , upon consideration of the foregoing petition and on motion of A. B., *pro* petitioner, it is ordered and decreed that the prayer of the petition be granted and that F. S. have leave to bid at the sale of said properties of said A. S., deceased, for the properties Nos. and , Street, Philadelphia, the purchase so made not to be confirmed without notice to and assent by the other parties in interest.

(Signature of Judge.)

§ 4904 Re-sale May be Ordered.

The court may at any time before confirmation of the sale order a re-sale if thereby more money can be obtained for the land. *Hay's Appeal*, 51 Pa. St., 58 (1865).

See Brews. Prac., Vol. II, §2042.

§ 4905 Form of Petition for Re-sale.

IN THE ORPHANS' COURT OF PHILADELPHIA. COUNTY.

In the matter of the estate of A. S., deceased.

Term, . No.

To the Honorable, the Judges of the said Court:

The petition of W. S. respectfully represents:

I. That he is a son and heir of the said A. S., deceased, and interested in his estate.

II. That proceedings in partition having been instituted in the said estate, the same were so proceeded in that upon the , F. S., trustee for the purpose of making sale of the real estate of said decedent, exposed for sale in accordance with an order of your Honorable Court, made , the premises marked No. 2 B in said order, and therein described.

III. That at said sale J. M. became the purchaser of said premises, for the price or sum of .

IV. That said price or sum of is totally inadequate and insufficient for the said premises.

V. That your petitioner is willing to bid at least ten per cent. in excess of said , if a re-sale be ordered, and to abide the decrees of the court in relation thereto.

Wherefore your petitioner prays your Honorable Court to award a citation directed to the said J. M., and to F. S., C. S., L. W. and E. K., being the other parties in interest in said estate, to show cause why the said sale of said premises should not be set aside, and a re-sale thereof ordered.

And your petitioner will ever pray, etc.

(Signature of petitioner.)

(Affidavit of truth of petition.)

DECREE.

And now (date), upon consideration of the foregoing petition and on motion of C. D., *pro* petitioner, it is ordered and decreed that a citation be awarded, directed to J. M., F. S., C. S., L. W., and E. K., to show cause why the sale of the premises marked No. 2 B in said order of sale, should not be set aside, and a re-sale thereof ordered.

(Signature of Judge.)

It is likely that the purchaser will file an answer to this petition.

§ 4906 Form of Purchaser's Answer.

(Caption.)

The separate answer of J. M. to the citation issued to him *sur* petition of W. S., to set aside sale of premises on the side of street, east of street, in the City of Philadelphia, respectfully showeth:

That the matters set forth in the first, second and third paragraphs of said petition are true; that the statement made in the fourth paragraph is not true; that at the said sale, there being a large attendance, said premises were offered for sale and after active competition therefor, participated in by the parties in interest in said estate or their representatives, the same were sold to this respondent, he being the highest and best bidder, and the price of being the highest and best price offered for the same; that other property in the same square belonging to same estate was sold the same day to one of the heirs at a lower rate than the property in question; that your respondent is and has been ready and willing to comply with the terms of sale, and has deposited one hundred dollars as earnest money with the auctioneers who conducted the sale.

He therefore prays your Honors to confirm said sale and order and direct the said trustee to convey said premises to your respondent.

And he will ever pray, etc. J. M.

(Affidavit.)

If the court be satisfied that the property at a re-sale will bring more than the original bid, the sale will be set aside upon the petitioner's entry of security to bid at a re-sale in an amount in excess of the sum offered at the first sale.

§ 4907 Form of Decree Setting Aside Sale, and Ordering Re-sale.

(Caption.)

And now, , upon consideration of the petition of W. S., the answer of J. M., and on motion of A. B., *pro* petitioner, it is orderedand decreed that the sale of premises No. 2 B. in the order of sale to J. M. be set aside and a re-sale thereof ordered upon the terms and conditions set forth in said order of sale and that F. S., trustee, pay to said J. M. the amount of earnest money paid by him upon account of said sale.

Security to be entered by said W. S. before , in the sum of dollars, conditioned for the performance by him of his agreement to bid at said re-sale of said premises in an amount equal to at least per cent. in excess of said dollars bid by the said J. M.

§ 4908 When Title May be Disputed.

In an action of ejectment it was held competent to prove that the title of the plaintiff's grantee, to whom the land had been confirmed by the Orphans' Court in partition, was held subject to a trust created by an agreement between such grantee and other heirs. *Bavington* vs. *Clarke*, 2 P. & W., 115 (1830).

§ 4909 Title Cannot be Attacked Collaterally.

A decree in partition by the Orphans' Court is conclusive, and in an action of ejectment against a party who has had the land allotted to him, will sustain his title. *Herr* vs. *Herr*, 5 Pa. St., 428 (1846); *Lair* vs. *Hunsicker*, 28 Pa. St., 115 (1857).

A proceeding to have partition in the Orphans' Court is a proceeding *in rem*. The status of the property, the fact of the owner dying seised and intestate, give jurisdiction. No error in the judgment of a court of competent jurisdiction, no matter how gross, and

although palpable on the record itself, can be revised or corrected by another court collaterally. (*Ibid.*) *Merklein* vs. *Trapnell*, 34 Pa. St., 42 (1859).

The decree is conclusive only as to the land embraced within it. *Ihmsen* vs. *Ormsby*, 32 Pa. St., 198 (1858)

§ 4910 Return to Order of Sale—Confirmation.

The property having been sold, the trustee should make return to the court.

Form of Return.

IN THE ORPHANS' COURT FOR PHILADELPHIA COUNTY.

In the matter of the estate of A. S., deceased.

Term. No. .

To the Honorable, the Judges of the said Court:

The return and petition of F. S., trustee for the purpose of making sale of the real estate of A. S., deceased, respectfully represents:

1. That pursuant to an order made by your Honorable Court, upon the , having first given due and legal public notice by handbills and advertisement during at least twenty days, she did, by , auctioneers, upon , at the Philadelphia Exchange, northeast corner of Third and Walnut Streets, Philadelphia, at 12 o'clock noon of said day, expose the real estate in the said order of sale particularly described, to public sale at auction.

2. That at said sale, A. B., of Philadelphia, became the purchaser of said premises in said order of sale of (date), and in the annexed printed handbill described, to wit: (Here give description of property sold to A. B.), for the price or sum of , he being the highest bidder and that being the highest and best price bid for the same.

(Add similar averments as to each other property sold.)

Your petitioner therefore prays that the aforesaid sale of said premises to be confirmed and stand valid and stable to them, their heirs and assigns forever, and that upon the giving of security by your petitioner and upon receipt of the amount of said

purchase money by him that he execute to said deeds of conveyance of said premises so as aforesaid purchased by them.

And your petitioner will ever pray, etc.

(Affidavit.)

(Attach printed handbills and order of sale.)

DECREE.

And now, , upon consideration of the foregoing return to order of sale of , and petition for confirmation, and on motion of C. D., *pro* petitioner, it is ordered and decreed that the prayer thereof be granted, and that the sale of said premises in said order of sale and in said printed handbill to said petition annexed described, to wit: (Describe property), to the said , for the price or sum of dollars, be confirmed and stand firm and stable to him, his heirs and assigns forever, and that upon receipt of the purchase money for the same by the said F. S., trustee, that she shall and do execute to said a deed of conveyance of said premises so as aforesaid purchased by him.

(Add similar orders as to each property and conclude: Security to be entered in the sum of dollars, to be approved by the court.)

If there be a widow, the order of confirmation will follow the order of sale. (*Supra.*)

Where the trustee purchases at his own sale, the return will contain an averment similar to the following:—

That your Honorable Court having authorized your petitioner to bid at said sale, he became the purchaser of said premises second described and marked No. 2 in said order of sale and being marked in the annexed printed handbill and hereinbefore described, for the price or sum of dollars, he being the highest and best bidder, and that being the highest and best price bid for the same.

Where any portion of the property was unsold for want of a sufficient bid the petition should aver:—

That no sufficient bid being received for the other premises described and mentioned in said order of sale as Nos. 1 and 3, at the request of the parties in interest in the said partition your petitioner withdrew the same from sale.

In a proceeding where both the above conditions exist and the remainder of the property was duly sold, the prayer should be as follows :—

Your petitioner, therefore, prays that the aforesaid sales of said premises to the said be confirmed and stand valid and stable to them, their heirs and assigns forever, and that upon the giving of security by your petitioner and upon the receipt of the amount of said purchase money by her, that she execute to said deeds of conveyance of said premises so as aforesaid purchased by them, and that the Clerk of the Orphans' Court of Philadelphia County execute to your petitioner a deed of conveyance of said premises so as aforesaid purchased by her under authority of your Honorable Court ; and she hereto attaches the written assent and ratification of the other parties in interest to said sale made to her.

And your petitioner further prays your Honorable Court to order and direct that she again expose to public sale at the Philadelphia Exchange in the City of Philadelphia aforesaid, the beforementioned premises described in said order of sale as Nos. 1 and 3, in said order of sale, at such time or times as she may deem most expedient : *Provided*, That said time or times do not exceed six months from the date of said order of sale, and that she make return of her doings therein to this Honorable Court after such exposure to public sale of said premises.

And your petitioner will ever pray, etc.

The following paper will be annexed to the above petition :

We, the undersigned, being the other parties in interest in the estate of A. S., deceased, hereby assent to the purchase by F. S., of the premises No. , Rockland Street, Philadelphia, and agree to the confirmation of said purchase by the Orphans' Court.

(Signed by all other parties in interest.)

The decree will follow the above petition, and will order the Clerk of the Orphans' Court to execute the deed for the property purchased by the trustee, and that the latter again expose to sale the properties returned unsold.

§ 4911 Orphans' Court May Appoint an Auditor and May Distribute Proceeds of Sale Among Creditors of Parties Interested.

In all cases where, in consequence of proceedings in partition, the share or any part thereof, of an heir, in real estate, shall be converted into money, either by reason of the impracticability or inequality of partition, or by virtue of a sale or otherwise, the Orphans' Court, before making a final decree confirming the partition or sale as aforesaid, may appoint a suitable person as auditor, to ascertain whether there are any liens or other incumbrances on such real estate, affecting the interests of the parties; and if it shall appear by the report of such auditor or otherwise, that there are such liens, the said court may order the amount of money which may be payable to any of the parties against whom liens exist, to be paid into the court, and shall have the like power as to the distribution thereof among the creditors or others, as is now exercised by the courts of common law, where money is paid into court by Sheriffs or Coroners; and where recognizances or other security shall be given for the payment of money, the court may make an order on the party giving such recognizances or other security, to pay the amount thereof into court, when the same shall become due, to be distributed in like manner among the persons holding liens at the time of the partition. (Act March 29, 1832, §49, P. L., 206.)

§ 4912 Before Distribution of Proceeds of Sale, Refunding Bonds to be Given.

Before any distribution of the proceeds of such real estate shall be made among the kindred of the decedent, the persons entitled to receive the same shall respectively give sufficient real or personal security, to be approved of by the Orphans' Court having jurisdiction, with condition that if any debt or demand shall be afterwards recovered against the estate of the decedent, or otherwise be duly made to appear, they will respectively refund the ratable part of such demand, and the costs and charges attending the recovery of the same, so far as such real estate would have been liable to such demand if it had remained unsold; but if the person or persons entitled to receive the same is or are unable to give the security aforesaid, then the money shall be put at interest, as directed in the forty-first section of this act. (Act February 24, 1834, §45, P. L., 82.)

In a partition proceeding, the administrators acting as trustees are not required to take refunding bonds upon distribution. *Trausue Estate*, 141 Pa. St., 170 (1891).

§ 4913 In Cases of Partition, Purchaser May Pay Money Into Court for Distribution.

The provisions of the nineteenth section of the Act of the twenty-fourth day of February, 1834, entitled, "An act relating to "executors and administrators," be and the same are hereby extended to all sales of real estate of decedent, made by virtue of an order of an Orphans' Court, under proceedings in partition, whether the said sales be made before or after the expiration of two years from the granting of letters testamentary or of administration, and the moneys arising from such sales shall be paid into court and distributed according to law. (Act March 27, 1865, §1, P. L., 45.)

§ 4914 The Court May Require Payment Into Court or May Make Such Order as May be Just.

So much of the Act of Assembly, approved the twenty-seventh day of March, 1865, entitled, "An act relating to proceedings in "partition," as requires the money arising from such sales to be paid into court, be and the same is hereby modified so that the court may, in its discretion. require such payment, or may make such order as may be just in the premises. (Act April 28, 1868, §1, P. L., 105.)

If the administrator distribute the proceeds of the sale to an heir against whom a judgment is entered, the administrator is responsible to the judgment creditor. The proceeds should be paid into court and an auditor appointed. *Lucas' Appeal*, 53 Pa. St., 404 (1866).

§ 4915 Trustee to File an Account of Proceeds of Sale.

Upon the sale of any real estate by an administrator or trustee, after proceedings in partition in the Orphans' Court, it shall be the duty of the said administrator or trustee to file in the office of the Register of the proper county, an account of his said administration or trusteeship, in the same manner as is now by law required in the settlement of the estates of decedents. (Act April 11, 1863, §1, P. L., 341.)

§ 4916 When Share of Proceeds of Sale in Partition Descends as Real Estate.

Land of a decedent was sold under proceedings in the Orphans' Court. A daughter's share of the proceeds was paid to her husband. She died, leaving her husband and three children, two of whom died intestate. *Held*, That the share of the deceased children was personalty and passed to the father. The share of the wife went to her children, subject to the husband's life estate. *Hay's Appeal*, 52 Pa. St., 449 (1866).

Where an heir dies after an order of sale in partition has been granted, but before its execution, his share descends as real estate. *Ferree* vs. *Comm.*, 8 S. & R., 312 (1822); *Withers' Appeal*, 14 Id., 185 (1826).

And this, although the sale be confirmed, but the purchase money be unpaid and deed unexecuted. *Erb* vs. *Erb*, 9 W. & S., 147 (1845).

Where A. being absent seven years and upwards, was presumed to be dead, his share of the proceeds of partition proceedings in his father's estate, paid to his trustee *durante absentia*, was awarded, upon the latter's account, to A.'s children and not to his creditors. *Esterly's Appeal*, 109 Pa. St., 222 (1885).

§ 4917 Costs and Counsel Fees.

See *Association* vs. *Bank*, 142 Pa. St., 121 (1891); following *Grubb's Appeal*, 82 Pa. St., 29 (1876), and see, also, Brews. Prac., Vol. II, §2048.

§ 4918 To be Paid by all Parties in Proportion to their Interests.

The costs in all cases of partition in the Common Pleas or Orphans' Court of this Commonwealth, with a reasonable allowance to the plaintiffs or petitioners for counsel fees to be taxed by the court, or under its direction, shall be paid by all the parties, in proportion to their several interests. (Act April 27, 1864, §1, P. L., 641.)

§ 4919 Former Partitions, Otherwise Regular, Not to be Invalidated for Want of Jurisdiction.

All proceedings heretofore had in the Orphans' Court of this Commonwealth, for the partitions of any testator's estate or estates, wherein partition hath been made, or the property taken at the valuation, or sold and conveyed under the order of such court, by executors or administrators, and the proceeds of such sales distributed according to the will of the testator, shall be considered and taken to be as valid and effectual as if such courts had had jurisdiction of the same. (Act April 13, 1840, §3, P. L., 320.)

The true intent and meaning of the third section of the act passed the thirteenth day of April, 1840, entitled, "A further "supplement to an act entitled, 'An act relating to Orphans' "'Courts, passed the twenty-ninth day of March, 1832, and the "'supplement thereto, passed the fourteenth day of April, 1835, "'and for other purposes,'" is hereby declared to be, that the title of persons to real property of decedents within this Commonwealth, heretofore acquired under proceedings in partition in the Orphans' Courts, if such proceedings were in other respects regular, shall not be impaired, or in any wise defeated or made void, by or upon any other proceeding in any court of this Commonwealth, by reason of such property or any part thereof having been devised by any such decedent to children or heirs generally, or to any one

or more of them, or of other persons, if such devise to one or more had become lapsed, or had become forfeited for non-performance of any condition, or the devisee or devisees, for any reason, had refused to take or accept the same; but all such titles so acquired shall be considered and taken to be as valid and indefeasible as in cases of intestacy, unless the same have been invalidated by reversal of the decree or decrees awarding the same, upon appeal duly taken and prosecuted: *Provided*, That in all such cases, where the same has not already been done, and where the moneys have not yet been appropriated or paid, it shall be competent for the proper Orphans' Court, upon application made, to decree the payment of the amount of the valuation, or of the proceeds of sale, to such person or persons as are, according to the last will and testament of the decedent, entitled thereto in law or equity. (Act April 25, 1850, §4, P. L., 570.)

The provisions of the said third section of the Act of April 13, 1840, according to the meaning thereof, as declared by the first (fourth) section of this act, shall extend to all cases which have heretofore arisen, and which may hereafter arise within this Commonwealth. (Act April 25, 1850, §5, P. L., 570.)

See also Act of February 26, 1869, §1 (P. L., 4). (*Supra.*)

In all cases in which there have been proceedings in any of the Orphans' Courts of this Commonwealth for the partition of real estate between one or more living co-tenants or tenants in common, and the heirs, devisees or legal representatives of any decedent, who, at and before his or her decease, was a co-tenant or tenant in common with said living party or parties, and the same have been carried out by the division of the realty, by the allotment thereof to one or more of the parties at the valuation, or by a sale thereof under the orders or decrees of such courts, all such proceedings are hereby declared valid and effectual as if the said Orphans' Courts had had full jurisdiction of the same: *Provided*, That the parties in interest have had the same notice required to be given in such cases where the court has jurisdiction. (Act May 13, 1876, §1, P. L., 172.)

§ 4920 Partition Docket to be Kept—Fees, etc.

It shall be the duty of the Clerks of the Orphans' Courts of the several counties of this Commonwealth, and they are hereby required to enter in a book to be procured for that purpose, to be called a partition docket, all the proceedings in partition in every case in their respective courts, from the commencement to the final judgment and decree thereon, and which shall be and the same is hereby made the record of said court. For which service such Clerks shall be entitled to receive the same fees as the Recorders of Deeds receive for recording, to be taxed and paid as part of the costs of such proceedings. (Act April 4, 1889, P. L., 23.)

CHAPTER XVI.

THE LIEN OF DECEDENT'S DEBTS.

§ 4921

In Pennsylvania lands are liable to be taken in execution and sold for the debts of the owner. Immediately upon the death of a debtor his debts become a lien upon all his real estate. In order that those who succeed to the possession and ownership of lands may thereby be enabled to dispose of their property, it was necessary that this lien should be placed under certain regulations and limitations. Latent liens are not favored, and have been discouraged with us, where lands have frequently changed ownership in almost as rapid succession as if they had been goods and chattels. Great injustice, as well as inconvenience, must ever result from secret liens being permitted to continue without limitation under any circumstances whatever. KENNEDY, J., *Kerper* vs. *Hoch*, 1 Watts, 9 (1832); *Hepburn* vs. *Snyder*, 3 Pa. St., 72 (1846).

The Act of fourth April, 1797 (3 Bioren, 296), which was a supplement to the Act of nineteenth April, 1794 (Id., 143), provided as follows:

SECTION IV. Whereas, inconveniences may arise from the debts of deceased persons remaining a lien on their lands and tenements an indefinite period of time after their decease, whereby *bona fide*

purchasers may be injured and titles become insecure: Therefore, * * * no such debts. except they be secured by mortgage, judgment, recognizance, or other record, shall remain a lien on said lands and tenements longer than seven years after the decease of such debtor, unless an action for the recovery thereof be commenced and duly prosecuted against his or her heirs, executors or administrators, within the said period of seven years, or a copy or particular written statement of any bond, covenant, debt or demand, where the same is not payable within the said period of seven years, shall be filed within the said period in the office of the Prothonotary of the county where the lands lie. *Provided, always*, That a debt due and owing to a person, who at the time of the decease of such debtor is a *feme covert*, in his or her minority, *non compos mentis*, in prison, or out of the limits of the United States, shall remain a lien on the said lands and tenements (notwithstanding the said term be expired), until four years after discoverture, or such person shall have arrived at the age of twenty-one years, be of sound mind, enlarged out of prison, or return into some one of the United States of America.

While the time mentioned in this act for the commencement of an action or the filing of a statement has been changed from seven to five years by the Act of 1834, and from five to two by the Act of 1893, *infra*, yet the act in many other respects remains unchanged, and the decisions of our Supreme Court, based upon the construction of the old act, as well as the Act of 1834, will be found useful in construing the meaning and requirements of the Act of 1893.

§ 4922 Decisions Under the Act of 1797.

A judgment originally obtained against a decedent's personal representatives will continue to be a lien for seven years. If revived within that period the lien will thereby be continued for five years longer. If either period elapse without a *sci. fa.* the lien is lost,

whether the lands be in the possession of the devisees or their grantees. *Penn* vs. *Hamilton*, 2 Watts, 53 (1833).

That a decedent's debt did not remain a lien on his estate in the possession of an heir longer than seven years. *Quigley* vs. *Beatty*, 4 Watts, 13 (1835).

If suit be brought within the seven years and duly prosecuted to judgment within that period, the lien will be extended to twelve years from the decedent's death. If the suit be commenced within the seven years, but judgment be not obtained until after that time, the lien will be continued till the expiration of five years from the date of the judgment, and may be indefinitely continued by a revival every succeeding five years. *Duncan* vs. *Clark*, 7 Watts, 217 (1838); *Steel* vs. *Henry*, 9 Watts, 523 (1840); *Payne* vs. *Craft*, 7 W. & S., 458 (1844); *Trevor's Adm'rs.* vs. *Ellenberger's Excrs.*, 2 P. & W., 94 (1830).

Where the record showed no proceeding except an action within seven years of the decedent's death, and the land was not brought into execution within the twelve years, the heir will take an absolute title at the expiration of that period.

One who purchases at a Sheriff's sale, after the termination of the twelve years, upon a proceeding begun within the first seven, takes no title. *Maus* vs. *Hummel*, 11 Pa. St., 228 (1849).

The debts cease to be a lien at the expiration of seven years from the decedent's death. At the end of that period the lands of which he died seised cannot be made liable for payment of such debts. *Seitzinger* vs. *Fisher*, 1 W. & S., 293 (1841).

A judgment obtained against the personal representatives after the seven years have elapsed, and a

levy and sale of the land, confer no title on the purchaser. *Bailey* vs. *Bowman*, 6 W. & S., 118 (1843).

In *Kerper* vs. *Hoch*, 1 Watts, 9 (1832), it was held that the Act of 1797 was a statute of limitation and repose, and protected not alone *bona fide* purchasers, but heirs and devisees and those who claimed under them. Where, nearly nine years after the intestate's death, suit was commenced and judgment obtained against his estate, it was decided that the holder of the judgment could not enforce it against the land which had been taken by a son under partition proceedings.

This was followed in *Commonwealth* vs. *Pool*, 6 Watts, 32 (1837), where it was held that an administrator may apply the proceeds of a partition sale to payment of debts not barred by lapse of time, but not to discharge a claim, the lien of which was lost.

The purchaser is only bound to look to the record. The fact that he or the heir knows of the existence of a debt not of record makes no difference, nor that the heir agreed that the estate should be bound. *Hemphill* vs. *Carpenter*, 6 Watts, 22 (1837).

It is immaterial at what period in the seven years, judgment is obtained—the lien extends to the end of twelve years without further proceedings than a suit against the personal representatives within the seven years. *Corrigan's Estate*, 82 Pa. St., 495 (1876).

The Act of 1797 protects the estate in the hands of a *bona fide* purchaser, but not in the hands of an executor, who has himself become the purchaser, indirectly, in pursuance of a power in the will. *Bruch* vs. *Lantz*, 2 Rawle, 392 (1830).

It will be remembered that the decisions above noted were under the Act of 1797.

§ 4923 The Act of February 24, 1834, §24 (P. L., 77, Br. Purd. 525, §97), provides:

No debts of a decedent, except they be secured by mortgage or judgment, shall remain a lien on the real estate of such decedent longer than five years after the decease of such debtor, unless an action for the recovery thereof be commenced and duly prosecuted against his heirs, executors or administrators, within the period of five years after his decease, or a copy or particular written statement of any bond, covenant, debt or demand, where the same is not payable within the said period of five years, shall be filed within the said period of five years, in the office of the Prothonotary of the county where the real estate to be charged is situate; and then to be a lien only for the period of five years after said bond, covenant, debt or demand becomes due.

§ 4924 The Act of June 8, 1893 (P. L., 392),

changes the duration of decedent's debts to two years. It is as follows:

That no debts of a decedent dying after the passage of this act, except they be secured by mortgage or judgment, shall remain a lien on the real estate of such decedent longer than two years after the decease of such debtor, unless an action for the recovery thereof be commenced against his heirs, executors or administrators within the period of two years after his decease, and duly prosecuted to judgment, or a copy or particular written statement of any bond, covenant, debt or demand, where the same is not payable within the said period of two years, shall be filed within the period of two years in the office of the Prothonotary of the county where the real estate to be charged is situate, and then to be a lien only for the period of two years after said bond, covenant, debt or demand becomes due. And it shall be the duty of the Prothonotary of said county, when a statement as aforesaid is filed in his office, to index the same in the judgment docket as other liens are indexed.

§ 4925 Court May Decree Real Estate to be Sold, Free From the Lien of Debts Not of Record.

SECTION 2. It shall and may be lawful for any executor, administrator, trustee, or any party interested in the real estate of any decedent, to present his, her or their petition to any court having jurisdiction of the settlement of such estate, setting forth all the particulars, and also that there are just and reasonable grounds for believing that said decedent left no debts not of record, and that it is desirable to have the real estate of said decedent relieved from any lien now given by law for such debts.

SECTION 3. It shall be lawful for said court having jurisdiction as aforesaid, to hear and determine the same, and shall have power to refer such petition to an examiner or master, whose duty it shall be to diligently inquire into the facts and circumstances alleged in any such petition, and report the same to said court, and the said court may in its discretion direct such notices to be given of such application either by publication or otherwise, as may be deemed necessary.

SECTION 4. It shall be the duty of said court, upon being fully satisfied as to the truth and justice of the matters alleged in any such petition and application, to decree and direct that the real estate of any such decedent shall be held and enjoyed free and clear of any lien of debts not of record of said decedent.

The Act of 1834 did not change the Act of 1797, except to substitute five years for seven, and ten years for twelve. *Corrigan's Estate*, 82 Pa. St., 495 (1876).

§ 4926 Decisions Under the Act of 1834.

When Time Begins to Run.

The time begins to run from the date of death, and not from the grant of letters. *Demmy's Appeal*, 43 Pa. St., 155 (1862).

Meaning of "Duly Prosecuted."

A suit is "duly prosecuted" where the action for the decedent's debt is brought against the adminis-

trator within five years and prosecuted to judgment within ten years from the decedent's death. *Phillips* vs. *Railroad Co.*, 107 Pa. St., 472 (1884).

Act Not Applicable to Judgments or Mortgages.

The twenty-fourth section of the Act of 1834 applies only to debts not in judgment or mortgage. The issuance of a *sci. fa.* on a restricted judgment is not filing "a copy or particular written statement" of the debt or demand as directed by clause two of said section, and will not continue the lien of the judgment against other lands in the hands of the widow and heirs, than those it originally bound. *McMurray's Admrs.* vs. *Hopper*, 43 Pa. St., 468 (1862).

General Rules as to Effect of Defendant's Death Upon Judgment Against Him or His Estate.

A judgment obtained against the estate of a decedent, after his death, loses its lien by lapse of time. *Greenough* vs. *Patton*, 7 Watts, 336 (1838).

The lien of a judgment obtained in the lifetime of a decedent is lost if not revived within five years. *Downey's Appeal*, 2 Watts, 297 (1834).

The lien of a judgment not revived, expires at the end of five years as against another judgment creditor, notwithstanding the death of the debtor before the termination of the five years. *Fryhoffer* vs. *Busby*, 17 S. & R., 121 (1827).

Sci. Fa. Issued in County of Administration Continues Lien Throughout State.

A *sci. fa.* against the executors or administrators of a deceased debtor, duly prosecuted to judgment in the county where the administration was granted, continues the lien of the debt on his real estate through-

out the State. *Bredin* vs. *Agnew*, 8 Pa. St., 233 (1848).

Real Estate Acquired by Defendant Between Judgment and Death Not Liable Without Sci. Fa. Against the Heirs.

Judgment was recovered against one who afterwards purchased real estate and died. There was no revival of the judgment within five years from the defendant's death. *Held*, That the judgment was not a lien on after-acquired real estate during the life of the owner, and at his death became a lien as a debt merely, and that the land in the hands of the widow and heirs was discharged from the judgment. *Moorehead* vs. *McKinney*, 9 Pa. St., 265 (1848).

Land Bound, Though Aliened by Defendant Within Five Years After Judgment Against Him.

Where the defendant dies within five years after judgment was entered against him, the lien of such judgment is continued as to land bound by it for five years after his decease, although he aliened the land after the judgment was rendered. If a *sci. fa.* be issued within five years of the defendant's death and served on the *terre tenant*, the lien will be continued as against such *terre tenant*. *Nicholas* vs. *Phelps*, 15 Pa. St., 36 (1850).

Cases Where the Act was Enforced Against Creditors.

In *Welsh's Appeal*, 10 Atlantic Rep., 34 (1887), the creditors were persuaded to postpone selling the real estate for over five years from the decedent's death, but nothing was said to them which would induce them to forbear to file liens, nor was any promise made that the lien of their debts should continue.

Held, that such lien was not extended beyond the five years.

In *Klinker's Appeal*, 1 Wh., 57 (1836), A. executed a note under seal, promising to pay B. a certain sum, when C. (an infant) should reach the age of twenty-one, with interest annually, "in trust for the "use of said C." *Held*, that a copy of the instrument not having been filed, according to the Act of 1797, the lien of the debt was gone at the end of seven years from A.'s death.

A decedent's debts cease to be a lien against his real estate after five years, notwithstanding he made a voluntary conveyance of it in his lifetime to defraud his creditors. *Shorman* vs. *Bank*, 5 W. & S., 373 (1843).

The lien will not be prolonged because an administrator advanced his own funds to pay the debts of his decedent within five years from his death. Where, after five years from the decedent's death, an order was granted to sell real estate for payment of a balance due the administrator upon settlement of his accounts, it was held that the administrator was entitled to receive only the amount expended for services in the settlement of his accounts, and the sums credited in his accounts as paid by him upon judgments recovered against himself as administrator within five years from the time of the decedent's death. *Demmy's Appeal*, 43 Pa. St., 155 (1862).

Though the executor pay the debts out of his own funds, the right of the devisees to hold the land discharged from their lien, through lapse of time, is unimpaired. *Loomis' Appeal*, 29 Pa. St., 237 (1857).

Where suit is brought and judgment obtained before a Justice of the Peace, the creditor must file a

transcript in the Prothonotary's office within the five years. *Wilkinson's Estate*, 7 Luzerne L. Register, 12 (1877).

An administrator who holds a debt against his intestate, is not exempt from the requirements of the act. *Clauser's Estate*, 1 W. & S., 208 (1841).

The holder of a simple contract debt who lies by for twelve years without action against the devisees, loses his lien. *Loomis' Appeal*, 29 Pa. St., 237 (1857).

In 1853 a surety upon an administration bond died. In 1869 default was made in distribution. In 1875 judgment was recovered against the surety's administrators and a *sci. fa.* was issued to charge his real estate. No suit having been commenced or copy of statement filed against the surety within five years from his death, it was held that there was no lien. *Commonwealth* vs. *Severn*, 11 Phila., 310 (1876).

The death of the *terre tenant* does not revive or continue the lien of a judgment against the former owner of real estate. Such *terre tenant* is not the debtor of the holder of the judgment, and section twenty-five of the Act of February 24, 1834, is inapplicable to such a case. *Judson* vs. *Lyle*, 8 Phila., 98 (1871).

The presentation before an auditor and proof of a claim against a decedent's estate does not constitute an "action" within the meaning of the Act of 1834, and does not extend the lien on the real estate of the decedent. *Craig's Appeal*, 5 W. N., 243 (1878); *Bindley's Appeal*, 69 Pa. St., 295 (1871).

Substituting the defendant's administrator in an action pending at the decease of defendant, is a sufficient commencement of an action to continue the lien

on the real estate. *Bredin* vs. *Agnew*, 8 Pa. St., 233 (1848).

The decedent died in 1857. In 1858 and 1860 part of his land was sold to pay debts. In 1863 another portion was sold for the same purpose, one of the debts being a judgment against the decedent in his lifetime. The proceeds of the last sale, after payment of the judgment creditor, were held to be distributable to the heirs, in exclusion of the common creditors. Their liens had expired and the previous orders of sale within the five years did not extend them. *Bindley's Appeal*, 69 Pa. St., 295 (1871).

A mechanic's lien is not a judgment and its lien will not be extended beyond five years by reason of the death of the owner of the building within that period. *Hershey* vs. *Shenk*, 58 Pa. St., 382 (1868).

In 1869, A., B. and C. made a mortgage upon certain real estate. A. died in May, 1870. The mortgage was not recorded until June, 1875, and no proceedings were had upon it until 1876. In the meantime B. had died and the writ issued against C., the surviving mortgagor, and the executors, widows and heirs of A. and B. The heirs of A. defended upon the ground that as the mortgage had not been recorded until after five years from the death of A., his heirs took his real estate free from the lien of such mortgage. *Held*, that the mortgagee was entitled to judgment. *McLaughlin* vs. *Ihmsen*, 85 Pa. St., 364 (1877).

Where the decedent in his lifetime covenanted to be responsible for and guarantee payment of interest upon a mortgage, until the mortgaged premises were so improved as to furnish sufficient security for the debt, it was held that such covenant could be enforced against the decedent's personal representatives; but

that the lien of the same could only be continued against the real estate of the decedent by proceeding as directed by section twenty-four of the Act of 1834. *Hunt's Appeals*, 105 Pa. St., 128 (1884).

The fact that no administration was raised does not relieve the creditor from the necessity of proceeding as directed by the Act of 1834. *Benner's Estate*, 2 Chest. Co. Rep., 233 (1884).

Act not Applicable to Debt Incurred in Settling the Estate.

The Act of 1834 does not apply to debts and expenses necessarily incurred after the decedent's death, for burying him and settling his estate, claimed from the proceeds of real estate. (*Ibid.*)

Compensation to the executor or administrator, is not a debt of the decedent, but part of the expenses of administration, and is not affected by the Acts limiting the lien of decedent's debts. *Cobaugh's Appeal*, 24 Pa. St., 143 (1854).

The creditors of a son levied upon and sold at Sheriff's sale his interest in his deceased father's real estate. Subsequently, and within five years of his death, the father's administrator sold his entire realty at an Orphans' Court sale for the payment of debts. The Sheriff's vendee brought ejectment for the interest of the son purchased by him. *Held*, That he was not entitled to recover. *Horner*, vs. *Hasbrouck*, 41 Pa. St., 169 (1861).

Judgments Existing at the Date of Death, Continue Valid Liens Against Heirs and Devisees Until Presumption of Payment Arises.

A judgment against a decedent at the time of his death, is a lien upon his real estate. A revival of it in

twelve years after his death, and a sale of the land divests the title of the heirs. *Fetterman* vs. *Murphy*, 4 Watts, 424 (1835).

"No statute limits the lien of a judgment in favor "of the heirs of the debtor, nor is there reason or "necessity for it. After a reasonable time for the "presentment of demands, it is proper to secure the "heirs from secret debts, that they may improve their "estates without risking the expenditure ; but the pro- "priety of it vanishes before a debt of record." *Brobst* vs. *Bright*, 8 Watts, 124 (1839).

The lapse of over nineteen years, without *scire facias*, was held not to relieve the heirs and devisees, in *Konigmaker* vs. *Brown*, 14 Pa. St., 269 (1850).

The thirty-fourth section of the Act of 1834, does not apply where the judgment was obtained in the lifetime of the decedent. *Bennett* vs. *Fulmer*, 49 Pa. St., 155 (1865).

A judgment against the testator in his lifetime, though not revived within five years of his decease, is a lien on the lands of a devisee. *Wells* vs. *Baird*, 3 Pa. St., 351 (1846).

Where the judgment is against the decedent at the time of his death, its lien is without limit against the heirs and devisees, and need not be revived in order to be enforced against the land held by them. *Shearer* vs. *Brinley*, 76 Pa. St., 300 (1874).

Shannon vs. *Newton*, 132 Pa. St., 375 (1890). *Per Curiam:* "An heir or devisee is a mere volunteer, and "takes but what there is left of his ancestor's or "testator's estate after the debts are paid. He is "not a *terre tenant*. And a judgment against a dece- "dent in his lifetime remains a lien against him, his "heirs and devisees, without revival." *Held, further*,

That the law as above laid down was not changed by the Act of June 1, 1887 (P. L., 289), which provides that no judgment shall continue a lien on real estate longer than five years "unless revived within that "period by agreement of the parties and *terre tenants* "filed in writing, * * * or a writ of *scire facias*."

A judgment of record at the date of the defendant's death, the lien of which had expired, is good, without suit against the devisee, until presumption of payment arises. *Baxter* vs. *Allen*, 77 Pa. St., 468 (1875).

Although a judgment be not revived by *sci. fa.* within five years, it continues a lien against the debtor's lands in the hands of his heirs and devisees, and is entitled to be paid from the proceeds of sale before the debts of general creditors, not reduced to judgment in the lifetime of the debtor. *Aurand's Appeal*, 34 Pa. St., 151 (1859).

So long as any of the ancestor's debts are valid liens and remain unpaid, neither the heirs nor their creditors can receive anything from the estate, though it be taken by an heir at a valuation and his recognizance be given therefor. *Blank's Appeal*, 3 Gr., 192 (1855).

Statute May be Waived by Parties Entitled to its Benefits.

The parties entitled to their benefits may waive the statutes limiting liens unless certain proceedings be adopted. Where an administratrix by an agreement with the heirs, paid from her own funds the debts due by the intestate, which it was agreed should be repaid by his estate, it was held that the heirs and volunteers claiming under them could not set up the statute limiting the liability of the land for such debts. *Wallace's Appeal*, 5 Pa. St., 103 (1847).

When Lien Discharged by Proceedings in Partition.

Where real estate is sold under order of the Orphans' Court in partition, after the expiration of two years from the grant of letters, such real estate is not liable in the hands of the purchaser, to the decedent's debts. Act of February 24, 1834, §42 (P. L., 81); (Br. Purd. 546, §187.)

A sale of the decedent's real estate, under an Orphans' Court order in partition proceedings, within two years from the grant of letters, does not divest the lien of debts under the Act of 1834. *Wilson's Appeal*, 45 Pa. St., 435 (1863).

In partition, each share is subject to the payment of liens against it. If an owner die pending the proceedings, his debts become liens upon his land, and attach to his interest and to the proceeds of the sale of such interest when received. *Kerr's Estate*, 4 Phila., 182 (1860).

§ 4927 Lien Discharged by Sale for Payment of Debts —Rights of Creditors, etc.

Whenever it shall satisfactorily appear to the executor or administrator that the personal estate of the decedent is insufficient to pay all just debts and the expenses of the administration, he shall proceed, without delay, in the manner provided by law, to sell, under the direction of the Orphans' Court having jurisdiction of his accounts, so much of the real estate as shall be necessary to supply the deficiency; and such real estate so sold shall not be liable in the hands of the purchaser for the debts of the decedent. (Act February 24, 1834, §20, P. L., 76; Br. Purd. 531, §120.)

See Chapter "Sales of Real Estate."

A mortgage made by a prior owner is a debt of the decedent who dies seised of the land. *Cadmus* vs. *Jackson*, 52 Pa. St., 295 (1866).

Upon a *sci. fa.* against an administrator d. b. n. c. t. a. with notice to the devisees, the latter may prove that the land was sold under an Orphans' Court order, to an amount and for a sum sufficient to pay all the debts of the decedent. Such fact being established, the plaintiff is entitled to judgment *quod recuperet* against the administrator, but he cannot recover against the devisees. The creditor in such case must look to the proceeds of the sale. *Benner* vs. *Phillips*, 9 W. & S., 13 (1845).

If, pending the execution of an order to sell real estate for payment of debts, a lien is suffered to expire, the holder must look to the personal estate. *Williamson's Appeal*, 1 Monaghan, 241 (1888); *Schreck's Estate*, 11 Luzerne Leg. Register, 211 (1882).

It was held in *Arndt's Appeal*, 117 Pa. St., 120 (1887), that the time of confirmation of the sale fixed the rights of the parties. *York's Appeal*, 110 Pa. St., 77 (1885), was distinguished.

The Orphans' Court will not grant an order to sell real estate for payment of debts, the lien of which has been lost by lapse of time. *Pry's Appeal*, 8 Watts, 253 (1839).

More than five years after the death of a guardian indebted to his ward, the latter obtained an order from the Orphans' Court to sell the guardian's real estate for payment of the debt. No proceeding had been taken within five years to continue the lien of the debt. *Held*, That the order to sell was erroneous. *Oliver's Appeal*, 101 Pa. St., 299 (1882), overruling *Oliver's Estate*, 29 Pitts. L. J., 456 (1882).

§ 4928 Lien Discharged by Sale Under the Price Act.

The Act of April 18, 1853 (P. L. 503), (Br. Purd, 1457, §1, *et seq.*), commonly called the "Price Act," provides, §1, for the sale, mortgaging, leasing or conveyance upon ground rent, of real estate acquired by descent or last will, in cases, *inter alia*, "whenever a "decedent's real estate is subject to the lien of debts "not of record."

The fifth section provides that "by every such "public sale, the premises sold shall be discharged "from all liens."

§ 4929 Effect of Sale Under Testamentary Power, to Pay Debts.

Where there is a sale under a testamentary power for payment of unscheduled debts, the land is discharged from the statutary lien of the testator's debts. *Cadbury* vs. *Duval*, 10 Pa. St., 265 (1849).

A sale by executors under such power does not discharge, in favor of the testator's heirs or devisees, the lien of a judgment obtained before his death and existing at that date, where the proceeds of the sale were applied to payment of subsequent liens. *Konigmaker* vs. *Brown*, 14 Pa. St., 269 (1850).

A devise to executors of land to be sold for payment of debts and legacies vests the estate in them as a trust fund for that purpose. If the executors neglect to execute the trust, the creditors may sell the land upon a judgment and execution. In such case there is no limit to the lien of debts short of a presumption of payment through lapse of time. *Alexander* vs. *McMurray*, 8 Watts, 504 (1839); *Steel* vs. *Henry*, 9 Watts, 523 (1840).

In *Church* vs. *Watson*, 50 Pa. St., 518 (1865), the court held that a general charge upon land by devise for the payment of debts did not create a testamentary lien of unlimited duration, subject to the presumption of payment by lapse of time. The decisions in *Alexander* vs. *McMurray*, and *Steel* vs. *Henry* (*supra*), were explained as applicable to cases where an executor unreasonably delayed petitioning to sell and postponed the sale to the prejudice of the creditors, afterwards seeking to take advantage of the delay occasioned by his own misconduct and *laches*.

In *Buffington* vs. *Railroad Company*, 74 Pa. St., 162 (1873), it was held that a direction to pay debts "in due and lawful time," and to sell the residue of the estate, and from the proceeds to pay the "debts "and legacies above," did not continue the lien of debts upon the land or its proceeds.

§ 4930 Effect of the Statute of Limitations Upon Claims Against Decedent's Estates.

It was held in *McClintock's Appeal*, 29 Pa. St., 360 (1857), that where less than six years had elapsed from the time a debt accrued, until the death of the debtor, but the six years had expired before the estate was settled and distributed, such debt was not barred by the statute.

Followed in *McCandless' Estate*, 61 Pa. St., 9 (1869). But these and similar prior cases were overruled by *York's Appeal*, 17 W. N., 17, 33 (1885), where it was held that the death of the debtor did not stop the running of the statute.

York's Appeal was recognized in *Light's Estate*, 27 W. N., 21 (1890), and followed in *Miskey* vs.

Miskey, 20 W. N., 470 (1887); *Chapman's Appeal*, 122 Pa. St., 331 (1888); and *Keyser's Appeal*, 23 W. N., 201 (1889).

In *McClintock's Appeal*, 1 Cent. Rep., 635 (1885), the Supreme Court decided that a note of decedent, not barred at the date of his death, was entitled to payment from the proceeds of real estate sold within five years after the decedent died, although at that time the note was over eight years old.

Upon the authority of this decision, the lower court, in *Chapman's Appeal*, 122 Pa. St., 331 (1888), decided in favor of the creditor. But the Supreme Court reversed, holding that *McClintock's Appeal* (*supra*), had been overruled by *York's Appeal*.

PAXSON, J.: "It will be noticed that the Act (of "1834) refers only to debts due by a decedent. It "has no reference to mere claims against his estate. "A debt established or admitted is a lien against the "real estate of a decedent for the period of five years "after his decease. A mere claim is not a lien until "first established as a debt. When, therefore, a claim-"ant demands the benefit of the statutory lien, he must "first show that he has a debt. A debt barred by the "statute is no debt at all, and it is begging the ques-"tion to say that it was a debt at one time, or that the "statute had not fully run at the death of the dece-"dent. In the latter case the statute may be tolled "and the lien preserved by commencing a suit within "the statutory period. It would be an anomaly to "hold that a claim barred by the statute, and therefore "incapable of coming in upon the personal estate, "which is the primary fund for the payment of debts, "could, years afterwards, be allowed out of the real "estate in the hands of the heirs or devisees."

In the first opinion in *York's Appeal*, PAXSON, J., said, that to toll the statute in the Orphans' Court it is only necessary to make a formal demand of the executor or administrator. But in *Keyser's Appeal*, 23 W. N., 201 (1889), it was held, per PAXSON, C. J., that the statute could not be tolled in the Orphans' Court by anything short of a suit at law, or what is its equivalent in the Orphans' Court. That formal demand upon the executors is not the equivalent of such action.

It would seem from the above decisions, that the Act of 1834 does not excuse a creditor who fails to bring his suit within the six years from the time his cause of action accrued, although at the date when that period has expired, five years have not elapsed since the death of the debtor.

If suit be brought after the expiration of the six years, but prior to the termination of the five, and the executor or administrator omit to plead the statute, the debt can be recovered, but not otherwise.

An administrator is not bound to set up the statute, and a judgment in the case last instanced would be valid.

§4931 As to Joining the Widow and Heirs of Decedent, Where the Plaintiff Intends to Charge the Real Estate with Payment of the Debt.

See Brews. Prac., Chapter, "How to Sue Out and Prosecute *Sci. Fas.*, etc.," §256. The following decisions may also be found useful:

Prior to the Act of 1834 a suit and judgment against the deceased debtor's administrators, with-

out notice to the heirs, bound the lands of the intestate. *Payne* vs. *Craft*, 7 W. & S., 458 (1844).

Where suit is brought within the five years against the executor and within five years from the rendition of the judgment, a *sci. fa.* is issued to bring in the heirs, the lien of the debt upon the real estate will be preserved. *Benner* vs. *Phillips*, 9 W. & S., 13 (1845).

After judgment against the executor, a *sci. fa.* may be issued against the devisee, in which proceeding, judgment may be entered against such devisee. *Moore* vs. *Skelton*, 14 Pa. St., 359 (1850).

A suit against the executor alone, without making the heirs or devisees parties, will continue the statutory lien of a debt against the estate of a decedent. *Kittera's Estate*, 17 Pa. St., 416 (1851).

Such suit within five years continues the lien for ten years from the death. *Sanders* vs. *Wagonseller*, 19 Pa. St., 248 (1852).

The creditor should obtain a judgment against the representatives and then obtain judgment *de terris* by *sci. fa.* against the heirs, in which proceeding the latter may contest the judgment on original grounds; otherwise the lien of the debt is lost.

A judgment against the administrator alone will not support an execution against the ancestor's land. *Atherton* vs. *Atherton*, 2 Pa. St., 112 (1845).

Where judgment for a debt contracted by the decedent in his lifetime was obtained against his administrator alone, and an execution was issued and the land sold, *Held*, That the omission to join the heirs was fatal and the sale passed no title as against them and the other creditors of the estate. *Mangan's Appeal*, 11 Atlantic Rep., 805 (1887).

§ 4932 Devisees, etc., Should be Brought in After Judgment Against Personal Representatives.

While it is not error to join the devisees in the original suit against the executor, the better practice is to obtain judgment first against the executor alone and then to bring in the devisees by a subsequent proceeding. *Colwell* vs. *Rockwell*, 100 Pa. St., 133 (1882).

But where the former practice is adopted, the proceedings and sale under the judgment obtained are valid. A mere mistake in practice will not render a judgment void. *Levan* vs. *Millholland*, 114 Pa. St., 49 (1886).

It was ruled in *Warden* vs. *Eichbaum*, 14 Pa. St., 121 (1850), that under the Act of 1834 the heirs must be made parties in order to divest their interest by Sheriff's sale, even though the sale took place in a suit commenced against the administrator before that act was passed.

The debt must be established against the widow, heirs or devisees before it is levied upon the decedent's real estate. The object of this is to enable them to contest the debt, and the rule is equally obligatory upon the creditor where the estate has been devised subject to payment of debts. *Sample* vs. *Barr*, 25 Pa. St., 457 (1854).

Though the heirs were never in actual possession of the land, the lien of a judgment against the administrators is discharged by the lapse of five years without proceedings to make them parties. *Kessler's Appeal*, 32 Pa. St., 390 (1859).

Judgment on a *sci. fa.* to revive against the heirs binds nothing except the ancestor's lands in their hands. Wherefore the court refused to allow a plea

by the heirs "that they took nothing by descent." *Coulter* vs. *Selby*, 39 Pa. St., 358 (1861).

In June, 1828, a judgment was obtained against A., who died in 1829, leaving real estate which descended to his children. In 1832 a *sci. fa.* issued on the judgment against A.'s representatives and judgment was entered thereon in March, 1833. In 1831 a judgment was obtained against one of A.'s children, which was revived in 1835. Under this judgment all the defendant's interest in his father's estate was sold April 2, 1838. *Held*, That the proceeds belonged to the creditor of the child, and not to A.'s judgment creditor. *Jack* vs. *Jones*, 5 Wh., 321 (1839).

An unconditional revival of a restricted judgment, during the lifetime of the defendant, makes it a general lien upon all his lands in the county. But after his death, such revival against his personal representatives only, continues the lien as originally restricted. Proceedings must be had against the widow and heirs in order to charge the defendant's other real estate as against them. But the widow and heirs would, without such proceedings, take the other real estate free of the judgment, *qua* judgment, but subject to the debts of the decedent, of which the judgment would be one. *McMurray's Adm'rs.* vs. *Hopper*, 43 Pa. St., 468 (1862).

A Sheriff's sale of a decedent's real estate, upon a judgment against his administrators to which the children are not made parties, does not divest their title. *McCracken* vs. *Roberts*, 19 Pa. St., 390 (1852).

In such case, in the absence of evidence of fraud on the part of the Sheriff's vendee, if the heir subsequently receive his proportion of the purchase money and execute a release to the purchaser, the heir will be

estopped from proving that his title did not pass by the sale. *Smith* vs. *Warden*, 19 Pa. St., 424 (1852).

A judgment before a Justice of the Peace, against an heir's administrator, without notice by summons to his widow and his children's guardian, which judgment is not entered in the Common Pleas, is not a lien on the land or the fund produced by its sale. *Dimond's Estate*, 14 Pa. St., 323 (1850).

While a judgment against an administrator is conclusive as to personalty, it is but *prima facie* as to real estate, and the heirs and devisees may question any item included in such judgment. *Steele* vs. *Lineberger*, 59 Pa. St., 308 (1868).

Thus, where there was a judgment against an administrator and a *sci. fa.* issued against the heirs, it was held that the judgment recovered upon such *sci. fa.* fixed the liability of the real estate, although such second judgment was for less than the first. *Walthaur's Heirs* vs. *Gossar*, 32 Pa. St., 259 (1858).

Such judgment against the executors alone is *prima facie* evidence of the amount of the debt in a *sci. fa.* against the heirs to charge the real estate. *Sergeant's Heirs* vs. *Ewing*, 36 Pa. St., 156 (1860).

Two writs of *sci. fa.*, duly prosecuted to judgment against the personal representatives, will continue as a mere debt, the lien of a judgment against the decedent in his lifetime, for ten years from his death. If within that time a *sci. fa.* be served on the widow and heirs, they must disprove the claim in order to relieve their inheritance from liability. If no *sci. fa.* be served upon the widow and heirs within the ten years, the lien is gone as to all the real estate except that to which it was restricted. *McMurray's Adm'rs.* vs. *Hopper*, 43 Pa. St., 468 (1862).

In *Born* vs. *Krips*, 19 W. N., 511 (1887); *Allen* vs. *Krips*, Ibid, the decedent died in 1872. In 1873 suit was brought against his administratrix and judgment was obtained in 1886, when *sci. fas.* were issued against the widow and heirs. Judgments were obtained on the *sci. fas.* for want of an appearance.

The court below struck off the judgments on the ground that the widow and heirs were not proceeded against within ten years of the decedent's death. Affirmed in *Allen* vs. *Krips*, 119 Pa. St., 1 (1888); and in *Allen* vs. *Krips*, 125 Pa. St., 504 (1889).

A non-joinder of any of the heirs must be objected to by plea in abatement. The fact that a minor was *personally* served cannot be taken advantage of by the other defendants. *Schwartz's Estate*, 14 Pa. St., 42 (1850).

The five-year lien under the Act of 1834, is extended to ten years by suit brought and judgment recovered against the personal representatives alone, within the first period. (*Ibid.*)

An action of debt, based upon such first judgment, to which action the heirs are made parties, is an original action, and the parties are bound to set up every available defence. Such second action being brought within the first five years, is of itself sufficient to continue the lien for the second period of five years. (*Ibid.*)

Where judgment was obtained against an executor within five years of the decedent's death, it is not a good defence, in a *sci. fa.*, to continue the lien upon such judgment against the widow and heirs, to set up that at the time of the decedent's death there was sufficient personal property to pay the debt. *Colwell* vs. *Rockwell*, 100 Pa. St., 133 (1882).

§ 4933 When Alienee Must be Joined.

Where the heir has alienated within the five years, the alienee must be made a party to a suit for a claim against the estate brought within the five years. The title of such alienee will not be divested by a sale upon a judgment obtained in such suit against the executor alone, with notice to the devisee. *Soles* vs. *Hickman*, 29 Pa. St., 342 (1857).

In a *sci. fa.* against the executor, widow and devisees, to charge the real estate of the decedent under the Act of 1834, a previous judgment for the same debt, against the executor, is conclusive upon him when he defends as devisee. *Comm.* vs. *Cochran*, 146 Pa. St., 223 (1892).

A judgment upon a *sci. fa.* against the executor, as such, where the latter is sole devisee, is conclusive. *Stewart* vs. *Montgomery*, 23 Pa. St., 410 (1854). In such case it is not material whether there is sufficient personal estate in the hands of the executor to pay the claim. The creditor may charge the land without waiting for a settlement of the personal estate. (*Ibid.*)

Where a person conveys lands in fraud of creditors, his heirs, after his death, need not be made parties to a judgment against his representatives in order to charge the land with the debt. *Smith* vs. *Grim*, 26 Pa. St., 95 (1856). The land in such case may be levied upon and sold without notice to the widow and heirs. *Drum* vs. *Painter*, 27 Pa. St., 148 (1855).

Where a *fi. fa.* issued in the decedent's lifetime upon a judgment entered on a note waiving inquisition, although the *fi. fa.* was not served until after the defendant's decease, a *sci. fa.* against the widow and heirs is not required. *Davey's Estate*, 9 County Court Rep., 125 (1890.)

A *sci. fa. sur* mortgage is not within §34 of the Act of February 24, 1834. *Chambers* vs. *Carson*, 2 Wh., 365 (1836); *Hare* vs. *Mallock*, 1 Miles, 268 (1836).

Omission to serve the heirs will not avoid the sale, but the heirs may defend upon ejectment by the purchaser, the same as they could have done upon the *sci. fa.* *Wallace* vs. *Blair*, 1 Gr. 75 (1854); *Mevey's Appeal*, 4 Pa. St., 80 (1846).

In ejectment by the purchaser at the Sheriff's sale, the validity of a judgment upon two returns of *nihil* cannot be impeached, though the mortgagor was living on the land at the time both writs issued. If such judgment be erroneous, it must be reversed by a writ of error. *Colley* vs. *Latimer*, 5 S. & R., 211 (1819); see *Hartman* vs. *Ogborn*, 54 Pa. St., 120 (1867).

Where the will works an equitable conversion of the real estate, the widow and heirs have an interest in it only as personalty. In such case, a sale upon a judgment against the personal representatives, without a *sci. fa.* against the widow and heirs, is valid. *Leiper* vs. *Thomson*, 60 Pa. St., 177 (1869).

Where the executors were authorized by the will to sell the real estate at private or public sales, and by proper deeds duly executed to grant the same to the purchasers in fee simple: *Held*, That the executors became the *terre tenants* of the land, and that in order to revive a lien upon it, it was not necessary to make the widow and heirs parties, and that notice to the executors was sufficient. *Hall's Appeal*, 1 Penny., 223 (1881).

Where in an action of covenant *sur* ground rent deed, it was not sought to enforce the judgment against the deceased covenantor's real estate other than that

from which the rent was reserved, it was held that the widow and heirs need not be made parties. *Rushton* vs. *Lippincott*, 119 Pa. St., 12 (1888).

In *Murphy's Appeal*, 8 W. & S., 165 (1844), it was held that a creditor who sued and obtained judgment against the administrator alone, without joining the widow and heirs, under §34 of the Act of February 24, 1834, did not release the real estate of the decedent from liability where the real estate was sold for payment of debts, under an order of the Orphans' Court, upon application of the administrator. That said section means that such judgment shall not be paid by an execution thereon.

The plaintiff may issue a *sci. fa.* against the administrator and the heirs and devisees to recover the judgment from the real estate. Such heirs and devisees may then make the same defense they could have made if originally joined in the suit, or the Orphans' Court, after a sale has been ordered as above referred to, should allow the heirs to show that the creditor's claim is unfounded. *Benner* vs. *Phillips*, 9 W. & S., 13 (1845).

Where judgment is entered against a defendant in his lifetime, it may be revived after his death, for purposes of lien and execution, by a *sci. fa.* against the administrator alone, without joining the widow and heirs.

If, however, judgment be revived by a *sci. fa.* against the administrator only, and a second *sci. fa.* be issued against the widow and heirs, a Sheriff's sale of the land upon the judgment obtained upon such second *sci. fa.* will pass a good title. *Grover* vs. *Boon*, 124 Pa. St., 399 (1889).

§ 4934 Effect of Two Returns of "Nihil."

In proceedings upon a *sci. fa. sur* mortgage, a sale upon a judgment upon two returns of "*nihil* "and there are no *terre tenants*," confers a good title upon the purchaser, although the defendant was dead when the first writ issued. *Warder* vs. *Tainter*, 4 Watts, 270 (1835).

Notwithstanding the Act of June 16, 1836, which provides that a "*sci. fa.* shall be served and returned "in the same manner as a summons," judgment may be taken upon two returns of *nihil*. *Chambers* vs. *Carson*, 2 Wh., 9 (1836); Id., p. 365.

A sale of land upon an execution issued after the defendant's death on a judgment against him in his lifetime, vests a good title in the purchaser. Such execution is not absolutely void, but merely voidable. *Speer* vs. *Sample*, 4 Watts, 367 (1835).

§ 4935 Revival and Collection of a Judgment Against Joint Defendants, Where One of Them has Died.

A *sci. fa.* against only the personal representatives of a deceased defendant in a joint judgment will not lie, though it be suggested that the surviving defendant in such judgment is insolvent. *Stoner* vs. *Stroman*, 9 W. & S., 85 (1845).

It was held in *Comm.* vs. *Miller*, 8 S. & R., 452 (1822), that the personal property of one of several joint defendants was discharged by his death, but that the judgment continued a lien on his land. That the proper way of rendering the judgment effective was to issue a *sci. fa.* against the survivors, and the executors or administrators of the deceased defendant; that a

terre tenant, though in such case omitted from the record may come in and defend *pro interesse suo.*

Followed in *Comm.* vs. *Mateer*, 16 S. & R., 416 (1827).

It was formerly held that the *sci. fa.* in such case against the representatives of the deceased joint debtor should omit the words "goods and effects" from the directions of the writ. *Stiles* vs. *Brock*, 1 Pa. St., 215 (1845).

Where one of two joint debtors died pending an action where both were served, his administrator was substituted on the plaintiff's motion, and the suit proceeded to trial and judgment against the surviving defendant and such administrator jointly. The execution in such case against the estate of the decedent was held to be subject to §§33 and 34 of the Act of 1834. *Dingman* vs. *Amsink*, 77 Pa. St., 114 (1874).

In *Dowling* vs. *McGregor*, 91 Pa. St., 410 (1879), Judge MERCUR said:

"It was formerly held in case of a judgment "against joint defendants, and one of them dies, his "personal property was discharged from execution; "but the plaintiff therein might have execution of the "lands and tenements of the deceased party which "were bound by the judgment at the time it was "obtained. In such case, it was held error for the "writ of *scire facias* to call on the administrator of the "deceased party to show cause why the plaintiff "should not have execution against the 'goods and "'effects' of the deceased in his hands. *Stiles* vs. "*Brock*, 1 Barr, 215. The Statute of Westminster "II, made the remedy against the land bound by the "lien, effective by *scire facias* against the survivor and

"the heirs and *terre tenants* of those who had died. "Under our practice the executor or administrator is "substituted for the heir. *Comm.* vs. *Miller's Adm'rs.*, 8 "S. & R., 452. Hence, if one of several joint defend- "ants in a judgment dies, a *scire facias* may issue "against the survivors and the executor or adminis- "trator of the deceased. *Comm.* vs. *Mateer*, 16 S. & "R., 416. The error pointed out in *Stiles* vs. *Brock* "(*supra*), in seeking execution against the 'goods "'and effects' of the deceased in the hands of the "administrator, was cured by the Act of April 11, "1848, P. L., 536. It declares, 'When a judgment "'shall hereafter be obtained against two or more "'copartners, or joint or several obligors, promissors, "'or contractors, the death of one or more of the "'defendants shall not discharge his or their estate or "'estates, real or personal, from the payment thereof; "'but the same shall be payable by his or their exec- "'utors or administrators as if the judgment had been "'several against the deceased alone.' The right to "prosecute a claim founded on a joint contract "against the survivor and the personal representa- "tives of the decedent, when one or more of the "defendants dies during the pendency of the action, "is given by the first section of the Act of March 22, "1861. It declares, 'the same shall be proceeded in "'to judgment and execution against the estate of "'said decedent, as though the said suit or suits had "'been commenced against' their decedent or dece- "'dents alone.' In *Dingman* vs. *Amsink*, 27 P. F. S., "114, it was held proper under this act to substitute "the personal representatives of the decedent, and "for the suit to proceed to trial and judgment against "them and the surviving defendants jointly. As,

"therefore, both the real and personal estate of a "deceased joint debtor are assets for the payment of "his debts, in the hands of his personal representa- "tives, no sound reason exists why the representatives "should not be joined with the surviving defendants "in a *scire facias* on the judgment."

A *sci. fa.* to revive a judgment against three defendants, one of whom was dead when the writ issued, will be quashed upon a plea in abatement. The fact of death should be noted and the personal representatives made parties. *McCabe* vs. *U. S.*, 4 Watts, 325 (1835).

§ 4936 Affidavits of Defence, by Heirs and Personal Representatives.

In *Hall* vs. *Wiggins*, 15 W. N., 112 (1884), a judgment had been obtained against the decedent in his lifetime and a writ of *sci. fa.* was issued to charge the decedent's lands with the lien of the judgment. The widow and heirs filed an affidavit of defence. A rule for judgment was taken. The court being of opinion that an affidavit was not required in such case, discharged the rule.

In *Stadelman* vs. *Trust Co.*, 35 Leg. Int., 366 (1878) where judgment was obtained against the administrator, the court held that the heirs need not file an affidavit of defence to a *sci. fa.* issued against them to show cause why execution should not be levied of their lands.

In *Leibert* vs. *Hocker*, 1 Miles, 263 (1836), it was held that under the Act of 1835 an affidavit of defence was not required in a suit against the executor of an indorsee of promissory notes.

In *Umberger* vs. *Zearing*, 8 S. & R., 163 (1822), it was ruled that an executor need not file an affidavit of defence to a suit brought to recover a debt due by the decedent. But where the judgment is against the executor himself such affidavit is required to a *sci. fa.* upon the judgment.

Where the cause of action arose before the decease of the debtor, the executor or administrator need not file an affidavit of defence. *Seymour* vs. *Hubert*, 83 Pa. St., 346 (1877). This ruling was recognized by the Common Pleas, No. 4, of Philadelphia, in *Wireman* vs. *Insurance Co.*, 20 W. N., 299 (1887), and a prior rule of that court requiring executors and administrators to file affidavits of defence was recinded. In 1893, the following rule upon the subject was adopted by the Common Pleas of Philadelphia:

Section 4, b. An affidavit of defence shall be required from executors, administrators, guardians, committees and others sued in a representative capacity: *Provided*, That an affidavit by the defendant in said cases, stating that he has made diligent inquiry and has not been able to obtain sufficient information to enable him to set forth particularly the nature and character of the defence, but that he believes there is a just and legal defence, shall be deemed a sufficient compliance with this rule.

§ 4937 Definition of "Terre Tenants."

Those who hold the fee are *terre tenants*. An occupier is not such. Those who can come under a *sci. fa.* as *terre tenants*, are those only who claim by a conveyance subsequent to the judgment. *Chahoon* vs. *Hollenback*, 16 S. & R., 425 (1826).

§ 4938 Calculation of Interest on Revived Judgments.

Upon a judgment of revival, interest is calculated anew. Such judgment is equivalent to a judgment *quod recuperet*. *Meason's Estate*, 5 Watts, 464 (1836).

The plaintiff may calculate the interest on the aggregate amount of principal and interest due when the judgment is obtained on the *sci. fa.* *Fries* vs. *Watson*, 5 S. & R., 220 (1819).

§ 4939 Execution Upon the Revived Judgment.

In *Grover* vs. *Boon*, 124 Pa. St., 399 (1889), it was argued upon the authority of *Irwin* vs. *Nixon*, 11 Pa. St., 419 (1849), that the universal practice of issuing execution on the revived judgment and not upon the original, was to be deprecated. The court said, upon this point: "It may be admitted that the proper prac-"tice is to issue the execution upon the original judg-"ment and not upon the judgment recovered upon the "*scire facias*. *Irwin* vs. *Nixon*, 11 Pa. St., 419. This, "however, is but an irregularity and cannot affect the "title of a purchaser at Sheriff's sale."

It may be remarked that executions in Pennsylvania are invariably issued upon the revived judgment. This practice has many advantages, for the amount of the judgment is fixed by the assessment of damages upon such revival. Where there have been several revivals and assessments upon each, it would be extremely difficult to state the true amount due the plaintiff unless the sum fixed by the assessment upon the last revival were taken.

§ 4940 Preference as to Debts for Which Suit is Commenced Within the Five Years.

In distributing the proceeds of sale of a decedent's real estate, after liens of record, existing in his lifetime have been paid, a debt whose lien has been continued by suit within five years against the executors and devisees, is entitled to preference over general debts, the statutory lien of which has expired. *Kittera's Estate*, 17 Pa. St., 416 (1851).

§ 4941 Distribution of Proceeds of Decedent's Estate Sold Under Execution.

The Act of February 24, 1834, §33 (P. L., 77); (Br. Purd., 529, §111), provides that "in all cases where "property, real or personal, of a decedent, is sold "upon an execution, and more money raised than is "sufficient to pay off liens of record, the balance shall "be paid over to the executor or administrator for dis- "tribution. * * * Such money shall be distributed "as the real estate of which it is the proceeds would "have been."

The thirty-third section of the Act of February 24, 1834, does not prevent the conversion of land of a decedent sold under a mortgage existing at the time of his death. The mode of distribution is regulated by said section. *Phillips' Estate*, 13 W. N., 355 (1883).

Liens of record only are to be paid out of the fund in court realized from the sale of a decedent's estate under execution. The general debts are not entitled to be satisfied unless secured by judgment prior to the defendant's death.

Obtaining a judgment against the personal representatives after the death of the decedent, gives no priority over other creditors.

Any balance after payment of record liens must be paid to and distributed through the personal representatives. *Willing* vs. *Yohe*, 1 Phila., 223 (1851).

§ 4942 When Personal Representatives Must be Brought In.

It was held in *Brown* vs. *Webb*, 1 Watts, 411 (1833), that a *sci. fa.* to revive a judgment after the defendant's death must be issued against his executors or administrators, who must be made parties to it. Suing only the heirs in possession is error.

Before the Act of 1834 the lands of a deceased debtor could be levied upon and sold in the same way as those of a living party, under an execution against his administrators, or against him where the execution was tested prior to his death. *Meanor* vs. *Hamilton*, 27 Pa. St., 137 (1856).

Where, under a *testatum fi. fa.*, levy has been made during the defendant's life, a *venditioni exponas* cannot issue, after his death, without a *sci. fa.* against the executor. *Wood's Executor* vs. *Colwell*, 34 Pa. St., 92 (1859).

A Sheriff's sale of land which the defendant had aliened, made after his death, without a *sci. fa.* against the personal representatives, passes a good title, if the judgment has been revived against the *terre tenant*. *Colborn* vs. *Trimpey*, 36 Pa. St., 463 (1860).

Upon settlement of the account of an executor or administrator, a transcript of any balance due by him must be filed in his lifetime ; his personal representa-

tives must be made parties to a *sci. fa.* issued upon such transcript after his death. If issued against the *terre tenants* and heirs alone, the plaintiff cannot recover. *Rowland* vs. *Harbaugh*, 5 Watts, 365 (1836).

A *sci. fa.* to revive and continue the lien of a judgment was issued within five years against the defendant's executor. The *præcipe* contained a suggestion of the defendant's death and the substitution of the executor, upon whom the *sci. fa.* was served, and judgment of revivor was subsequently entered. *Held*, That the suggestion of death was regular; that it was not necessary to bring the executor in and make him a party by judgment of the court, and that the lien was preserved. *Hall's Appeal*, 1 Penny., 223 (1881).

§ 4943 Proceedings Where Defendant Dies Between Judgment and Execution.

See Brews. Prac., Chapter XXVII, "Actions "After Death," §2220 *et seq.*

A decedent's land was sold after his death, upon a judgment entered in his lifetime, without a *sci. fa.* against the personal representatives. The executrix, after the sale, filed a paper waiving a *sci. fa.* and all irregularity and error in the proceedings. The Sheriff then made a deed to the purchaser, who brought ejectment for the land, but was non-suited by the lower court for want of a *sci. fa.* against the executrix before the execution. *Held*, That the entry of the non-suit was error. *Diese* vs. *Fackler*, 58 Pa. St., 109 (1868).

Where the mortgagor was served, and died after judgment was obtained against him, his personal representatives need not be warned by *sci. fa.* before

execution. *Hunsecker* vs. *Thomas*, 89 Pa. St., 154 (1879).

Where a *sci. fa.* is issued to revive a judgment obtained against the decedent in his lifetime, the administrator may appear and confess judgment, and may also waive inquisition on the execution thereon. *Bennett* vs. *Fulmer*, 49 Pa. St., 155 (1865).

The sale by a Sheriff of lands of one of the devisees does not effect the creditor's right to a judgment *de terris* against lands held by another devisee. *Wells* vs. *Baird*, 3 Pa. St., 351 (1846).

Where land charged with payment of an annuity descended to the heirs-at-law, of which the annuitant was one, held that the land was discharged from payment of the annuity, *pro tanto*, which the annuitant took as heir. *Addams* vs. *Hefferman*, 9 Watts, 529 (1840).

§ 4944 Revival by Foreign Executors or Administrators.

See Brews. Prac., Chapter VIII, "How to Sue "Out and Prosecute *sci. fas.* etc." §254.

§ 4945 Claims Against Decedent's Real Estate.

(See Ibid, §257.)

§ 4946 Suggestion of Defendant's Death, After Suit Brought, Filed to Continue Lien Against Realty.

(See Ibid, §257.)

§ 4947 Proceedings Upon Sci. Fa. and Return.

(See Ibid, §§259, 260).

See, also, Brews. Prac., Chapter XXVII, "Actions "After Death," and Brews. Prac., Chapter XXIX, "Abatement."

CHAPTER XVII.

BILLS OF REVIEW.

§ 4948

Although proceedings upon bills of review in the Orphans' Court are regulated by our statutes, the remedy may be regarded as part of a general equitable jurisdiction. The Orphans' Courts exercised this jurisdiction before the Act of 1840.

§ 4949 General Principles.

In chancery the bill of review is a method of reversing a decree—either for error on its face or for discovery of new matter. In England error in law must appear in the decree, which contains the substance of the pleadings, etc. But in the United States decrees are drawn without these references. Therefore, in this country, it is not necessary in order to support a review, that the error should appear in the decree, but if it can be found anywhere in the record, it may be alleged. This excludes the evidence. We are now considering error of law.

§ 4950 Mistaken Judgment Not Sufficient.

It is clear, therefore, that a mistake in judgment is not of itself sufficient, for if it were so the bill of review would supersede the remedy by appeal.

Errors in form only and matters of abatement are not sufficient.

§4951 General Rules in Chancery as to Diligence.

Where a bill of review is founded on the occurrence or discovery of new matter, the leave of the court must be first obtained, and this will not be granted except on an affidavit, satisfying the court that the new matter could not, by reasonable diligence, have been produced or used by the applicant at the time when the decree was made, and showing, also, that such new matter is relevant and material, either as evidence of matter formerly in issue, or as constituting a new issue, and is such as, if previously before the court, might probably have occasioned a different decision. If such a bill be filed without leave, it will be taken off the file, or the proceedings stayed.

§4952 As to Impeaching the Witnesses—Cumulative Testimony.

The bill cannot be maintained where the newly discovered evidence, upon which the bill purports to be founded, goes to impeach the character of witnesses examined in the original suit. Nor can it be maintained where the newly discovered evidence is merely cumulative, and relates to a collateral fact in the issue, not of itself, if admitted, by any means decisive or controlling; such as the question of adequacy of price, when the main question was whether a deed was a deed of sale or a mortgage. *Southard* vs. *Russell*, 16 How. (U. S.), 547. The new matter must also be such as the party could not by the use of reasonable diligence have known. Story Eq. Pl., §414;

Dexter vs. *Arnold*, 5 Mass., 312; *Livingston* vs. *Hubbs*, 3 Johns. Ch., 124; *Ridgeway* vs. *Toram*, 2 Maryl. Ch., 303.

§ 4953 Bill to Reverse a Reversal—Lapse of Time—Demurrer—Stay—Requisites of the Bill.

If a decree has been reversed on bill of review, another bill of review may be brought upon the decree of reversal. But when twenty years have elapsed from the time of pronouncing a decree, which has been signed and enrolled, a bill of review cannot be brought; and after a demurrer to a bill of review has been allowed, a new bill of review on the same ground cannot be brought.

It is a rule of the court that the bringing of a bill of review shall not prevent the execution of the decree impeached, and that a party shall not be allowed, except under very special circumstances, to file or prosecute such a bill, unless he perform at the proper time all that the decree commands.

In a bill of this nature it is necessary to state the former bill and the proceedings thereon; the decree and the point in which the party exhibiting the bill of review conceives himself aggrieved by it, and the ground of law, or the new matter upon which he seeks to impeach it; and if the decree be impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it, and the fact that the new matter has been discovered since the decree was made. The bill may pray simply that the decree may be reviewed and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the bill may also pray the further decree of the court to put the party complain-

ing of the former decree into the situation in which he would have been if that decree had not been executed.

§ 4954 The Penna. Act of October 13, 1840, §1 (P. L., 1; Br. Purd., 1286, §61), provides that

The Judges of the Orphans' Court of the Commonwealth of Pennsylvania, within five years after the final decree, confirming the original or supplementary account of any executor, administrator or guardian, which has or may be hereafter passed as aforesaid, upon petition of review being presented by such executor, administrator or guardian, or their legal representatives, or by any person interested therein, alleging errors in such account, which errors shall be specifically set forth in said petition of review, and said petition and errors being verified by oath or affirmation; said Orphans' Court shall grant a rehearing of so much of said account as is alleged to be error in said petition of review and give such relief as equity and justice may require, by reference to auditors, or otherwise; with like right of appeal to the Supreme Court as in other cases, except that the appeal shall be taken, under the provisions of this act, within one year after the decree made on the petition of review: *Provided*, That this act shall not extend to any cause when the balance found due shall have been actually paid and discharged by any executor, administrator or guardian.

Analysis of the Pennsylvania Statute.

§ 4955 First—As to the Time Within Which the Bill of Review Must be Presented.

This is fixed by the law as "within five years after the final decree confirming the original or supplementary account."

As to Stale Claims.

The following cases illustrate the aversion felt for stale claims:

After the lapse of twenty years after an account has been absolutely confirmed, the decree will be held final and conclusive. *Pennypacker's Appeal*, 14 Pa. St., 430 (1850).

Appeal of the Fidelity Co., 19 W. N., 114 (1887):

F. died in February, 1865, intestate, unmarried, and without issue. Letters of administration upon his estate were granted to his brother, A., and the account of the latter was filed and referred to an auditor, who by his report awarded the balance of the estate, after the payment of debts, etc., to A., as next of kin and heir-at-law. The auditor's report was not filed until May, 1884. In the meantime, in March, 1883, A. died. A petition was filed in May, 1884, by W., who was cognizant of these proceedings, claiming that he was next of kin of F., and that A. was an illegitimate son of the mother of F., and praying that the account be referred back to the auditor. The court granted the prayer of the petition and the auditor found the facts alleged by W. to be true, and awarded to him the estate of F., after surcharging the deceased administrator with large sums.

Held, That the right of W. to a bill of review was merely technical; that he had been guilty of gross *laches*, and that no case had been presented calling for the intervention of a Court of Equity.

GORDON, J.: "Nearly nineteen years after this "account ought to have been confirmed and laid away "with past things to be forever forgotten, and after "death has set his irrevocable seal upon the lips of "Adam J. Glasz, we have, on the petition of one Peter "Wagner, an alleged collateral heir of Frank J. Glasz, "this whole matter ripped up, or as it were, dug up "from its grave, the account re-examined by the

"Orphans' Court, Adam J. bastardized, and his estate "burthened with a cash charge of twenty-two thousand "dollars, together with fourteen thousand dollars in "city certificates, which had been previously distributed "to Adam J. Glasz, as brother and next of kin of "Frank J. Glasz. We need hardly say that this change "of base is an unexpected and alarming one to those "interested in the estate now under consideration. "What we have now to consider is whether this con- "dition of things ought to have been permitted? We "may say, *in limine*, that the case of the appellee is "wholly without merit, and rests upon a mere technical "right. That the two younger Glaszs were children "of the same mother is not a matter of question, nor is "there any doubt as to their brotherly relations and "affection, the one for the other. Adam, if we are to "look to the evidence, was faithful in the discharge of "his duties, as well to his mother and brother as to the "business in which they were mutually engaged, and "the probabilities are that but for Adam, Frank would "have had no estate to leave to anyone. But now, "some nineteen years after this matter ought to have "been, and would have been but for the neglect of the "court's officer, put at rest, and after Adam's death, "some collateral heir has discovered that he was a "bastard, and therefore could not inherit from his own "brother, and it is on this ground alone that the court "below has seen fit to set aside its previous action "and surcharge the estate of the decedent to a ruin- "ous amount, which in good conscience it ought never "to have been called upon to pay. That this transac- "tion is inequitable in the highest degree cannot be "doubted by any impartial person. Is, then, the tech- "nical condition of things such as to compel us to

"adopt the conclusion of the court below? We think "not. Time is an element of very material force in "all courts which are governed by the principles of "equity. This is illustrated by *Gress' Appeal*, 14 Pa. "St., 463, where a citation on the representatives of a "deceased guardian to file an account of his guardian- "ship, some eighteen years after his appointment, was "refused. This refusal was not put on the ground "either of presumption of payment or of settlement "with the ward, but as Mr. Justice BELL, who deliv- "ered the opinion of this court, said: 'It results "'altogether from the unwarrantable negligence of "'the party to call for an account, without offering "'any sufficient reason accounting for the delay.' Yet "in this case the guardian had neglected a positive "statutory duty, which makes the case stronger than "that under discussion, in that Glasz neglected no "duty, and the effect of the action of the court below "has been to visit upon his estate the default of its "own officer. So in the case of *McKnight* vs. "*Taylor*, 1 Howard, 161, it was held that after a "delay of nineteen years and three months it was too "late to ask a court of equity to interfere to compel "the execution of a trust, and it was therein stated by "Mr. Chief Justice TANEY, citing *Pratt* vs. *Vattier*, 9 "Peters, 416: 'That nothing can call a court of chan- "'cery into activity but conscience, good faith and "'reasonable diligence, and where these are wanting "'the court is passive and does nothing, and therefore "'from the beginning of equity jurisdiction there was "'always a limitation of suit in that court.' But it is "useless to multiply authorities upon a doctrine that is "so well established as to have become elementary, "and we have only to say that a case more proper for

"its application than the one in hand could scarcely "be conceived. For nearly nineteen years the appellee "slept on his rights, nor does he allege in his petition "that he was not during all that time perfectly cogniz- "ant of every fact set forth in that petition. It is only "after all these years, and after Glasz's power to "defend his estate has been effectually destroyed by "death, that he comes into a court of equitable juris- "diction to ask its help to enable him to seize upon "property to which he has no conscionable right, "and from which he would have been completely shut "out had it not been for the negligence of the auditor. "These circumstances give to the claim of the appellee "a very suspicious appearance—too much so, indeed, "to permit a Chancellor to move in the execution of "a claim so stale—and this is the more so as there has "been no attempt to account for this unreasonable "delay."

The Right to a Bill of Review may be Lost by Laches Even in Cases of Fraud.

In *Lee's Estate*, 29 W. N., 346 (1891), the executor filed his final account April 28, 1884. He omitted all notice of a note given by him to the testatrix, September 1, 1876, promising to pay nine hundred and seventy dollars and fifty cents, thirty days after demand. After adjudication of his account and payment of the balance to the daughter, he was without opposition on his own petition, discharged June 21, 1884. In the summer or fall of 1885, the daughter found the note and "at once requested payment." The executor alleged he had paid the note in the lifetime of the decedent and that it was barred by the Maryland statute, before her death. The bill of

review was not filed until more than five years after the daughter attained her majority and nearly six years after discovering the alleged fraud. The executor demurred. The bill was dismissed. The opinion of the court, per ASHMAN, J., contains a very full and able review of the cases. He says:

"To sum up, then, the facts, as set out and sworn "to by petitioner—and we have not gone outside of "her own statement—are these: When she found the "note, the relation of guardian and ward between her- "self and the respondent had virtually ended, and she "reached full age in three, or, at most, six months "thereafter; she promptly charged the respondent "with his indebtedness, and as promptly received an "explicit denial; and she then allowed more than five "years after attaining her majority, and nearly six "years after discovering the alleged fraud, to pass "before she commenced this proceeding. In all this "time she brought forward no new fact which could "have strengthened her first judgment of the transac- "tion, and no mis-statement by the respondent which "could have misled it; the materials for her charge of "dishonesty were the same, and were as much within "her grasp in 1885, as they are in 1891. The ques- "tion, it seems to us, is not so much fraud on the part "of the respondent as *laches* on that of the petitioner, "and in either aspect, the result must be adverse to "the petitioner, for the law will not presume fraud, "and it will not tolerate negligence. The cases have "been by turns severe and indulgent in dealing with "this subject, but we have not found any authoritative "decision where no disability, as of non-age or covert- "ure had intervened, in which relief was granted "when more than five years of inaction followed a full

"knowledge of the mistake or the fraud. *Kuhns'* "*Appeal*, 6 Nor., 100, was cited by the petitioner, but "the delay there was only two months, and the clos- "ing words of the opinion emphasize the distinction "between that case and this. 'It is mockery,' said "TRUNKEY, J., 'to say she could have ascertained "'the truth, for her confidence in her guardian long "'continued. There was not a circumstance to shake "'it or move her to inquiry.' Here there were both. "In *Weiting* vs. *Nissley*, 6 Barr, 141, the administra- "tor's account was confirmed in 1839, and the dis- "tributee, who was still a minor, applied in 1846 for a "review, alleging specific errors and omissions. The "petition was held too late. In *Buntings' Appeal*, 4 "W. & S., 469, a delay of seven years was adjudged "fatal. In *Mitchell* vs. *Kintzer*, 5 Barr, 216, the fraud "was committed in 1841, the widow promptly asserted "her rights by a re-entry, and she was permitted to "set up the fraud in an action of ejectment against "her in 1847. So in *Jackson* vs. *Summerville*, 1 Har., "359, which was referred to by the petitioner, the fraud "does not seem to have been understood by the "party aggrieved until nine years after it had been "perpetrated, and there was no delay on the side of "her heirs. In *Kinter's Appeal*, 12 P. F. S., 318, the "review was asked for in less than three years after "the filing of the account. * * * The demurrer "is sustained and the petition dismissed."

In *White's Estate*, 1 Dist. Rep., 508 (1892), the will was probated in 1868, and the first account was filed in 1870. A second account was filed in 1876. Both were audited, the reports confirmed absolutely and distribution made. No notice was given to a non-resident minor, who was directly interested. He

came of age July 25, 1886, and filed his petition October 31, 1891. He averred fraud and concealment, and prayed for an account. One of the executors had died.

It was held (opinion by HANNA, P. J.)

1. That it was now too late to set aside the decree.

2. That the Orphans' Court cannot without a bill of review, alter a final decree after the end of the term.

3. That a bill of review is too late after actual payment in accordance with a decree of court.

4. But that a petitioner might have a remedy by vacating the decree of confirmation, upon the ground of concealment and fraud, and by an order of restitution from the distributees of money improperly awarded to them.

The executor or administrator of the deceased executor and all parties entitled to notice to be made parties.

Leave was granted to amend the petition accordingly, etc.

§ 4956 **Second—For What the Review Must be Asked.**

The act refers alone to decrees confirming the accounts of executors, administrators and guardians.

Omissions and Mistakes.

Where an account has been absolutely confirmed the remedy for omissions, or mistakes, is by petition for review. *Downing's Estate*, 5 W., 90 (1836).

Not Allowed for Miscalculation of Interest.

After an estate has been settled and acquiesced in for a number of years, the adjudication will not be opened to compel the executor to account according

to a strict calculation of interest. *Deardorff's Appeal*, 6 W., 159 (1837); *Mylin's Case*, 7 W., 71 (1838); see *Bunting's Appeal*, 4 W. & S., 469 (1842).

Allowed to Surcharge Moneys Not Accounted For.

In *Brigg's Appeal*, 5 Watts, 91 (1836), it was held that the Orphans' Court, in the exercise of its discretion, had power to order a review of a guardian's account on the ground of his omission to account for money received—the omission having been newly discovered. But SERGEANT, J., said: "It is requisite that "this discretion be exercised with great caution and "only within a reasonable time, otherwise accounts "never would be at rest."

In *Kinter's Appeal*, 62 Pa. St., 318 (1869), SHARSWOOD, J., said that the Act of October 13, 1840, was probably passed in consequence of the decision in *Briggs' Appeal*. In *Kintzer's Appeal* it was held that the Act of 1840 did not protect the accountant from surcharge after distribution, of moneys not accounted for.

Not Allowed Because Distributees Refuse to Accept.

A bill of review cannot be filed by an administrator because the distributees decline to accept the sums decreed to them. *Gready's Estate*, 14 Phila., 259 (1881).

Allowed for Premature Filing and Decree.

In *Simpson's Appeal*, 18 W. N., 175 (1886), the account of the guardians was prematurely and illegally filed. The balance decreed to Mary V. Simpson was not coming to her at the time of the decree. A review was granted.

When Allowed for New Proof.

As matter of grace, a review may be granted for new proof discovered after the decree, which proof could not possibly have been used at the time when the decree was made. *Priestley's Appeal*, 127 Pa. St., 432 (1889).

Error of Law Must Appear.

But it will not lie for an error of law unless such error appear on the face of the decree. (*Ibid*, 433).

The words "shall grant," Act October 13, 1840, do not make a review a matter of right unless error in law appear on the record or new proof be discovered after the decree. (*Ibid.*)

The evidence will not be re-examined. (*Ibid.*)

Advertisement of Account Sec. Leg. Enough.

The statutory advertisement of filing an account, etc., is sufficient. (*Ibid*, 432.)

Overhauling Accounts of Guardians.

Guardian's accounts will not be opened, settlement being made with the ward after his majority in presence of a third party, especially after guardian's death, unless for clear mistake or fraud. *Roth's Estate*, 30 W. N., 408 (1892).

See chapter "Guardian and Ward."

If the Trustee be Dead, His Representatives Should Beware of Calling Any Witness to the Transaction.

The Act of June 11, 1891 (P. L., 287), excludes the survivor, except as to relevant matter occurring before death, "if, and only if, such relevant matter "occurred between himself and another person living

"and competent to testify, and who does so testify " * * * *against* such 'survivor,'" etc.

The representatives of the dead trustee should, if possible, absolutely abstain from calling any witness to the settlement or to other relevant matter. The moment they do so the attacking party becomes competent although the other be dead. The statute is most ambiguously expressed, but this seems to be its interpretation. *Roth's Estate*, 30 W. N., 408 (1892).

§4957 Third—By Whom the Petition for a Review Can be Presented.

The act requires that it should be presented by the executor, administrator, guardian or their legal representatives, or by some person interested.

A Creditor Whose Claim Was Not Adjudicated Cannot Have a Review.

If distribution be made under the direction of the Orphans' Court, upon filing refunding bonds, and the adjudication upon the account be confirmed absolutely, a creditor whose claim was not adjudicated has his remedy against the refunding bonds, but is not entitled to a petition of review. *Schaeffer's Appeal*, 119 Pa. St., 640 (1888).

§4958 Fourth—Requisites of the Petition.

The act requires a specification of errors and an affidavit.

A bill of review is in the nature of a new suit founded on some substantial error of law, appearing on the record of the former case or on newly discovered evidence. The petition must set forth specifically the error complained of and that a decree settling the account has been made. The averments of

error must be supported by evidence. *Cramp's Appeal*, 81 Pa. St., 95 (1876).

§ 4959 Form of Bill of Review.

IN THE ORPHANS' COURT FOR THE CITY AND COUNTY OF PHILADELPHIA.

In the matter of the estate of John Smith, deceased.

February Term, 1893. No. 100.

To the Honorable, the Judges of the said Court:

The petition of Joseph Smith respectfully represents:

1. That said John Smith, late of the county aforesaid, died on or about January 1, 1890, intestate, a widower, leaving to survive him two children, James Smith and Joseph Smith, your petitioner.

2. That January 5, 1890, letters of administration upon said estate of the said John Smith were granted by the Register of Wills of Philadelphia County to the said James Smith.

3. That said administrator, January 5, 1891, filed his account, which was audited by your Honorable Court the first Monday of February, 1891.

4. That the said adjudication was filed February 10, 1891, and absolutely confirmed February 28, 1891.

5. That said account of said administrator contained the following errors of fact:—

(*a*) Said accountant wholly neglected to account for the sum of one thousand dollars received by him from the Life Insurance Company, being the proceeds of a life insurance policy upon the life of said decedent, paid to said accountant January 30, 1890.

(*b*) Said accountant wholly neglected to account for a certain mortgage for fifteen hundred dollars held by the decedent against the property No. Street, Philadelphia.

(*c*) Said accountant as such administrator received from the sum of five hundred and thirty dollars in full for principal and interest of a note held by said decedent in his lifetime against said . But said accountant charged himself with only two hundred dollars of said sum, falsely representing said last named sum to be the full amount received by him from the said . (Set forth all matters complained of.)

6. Your petitioner, at the time said account was filed and adjudicated, was absent from the City of Philadelphia. He did not return until after the absolute confirmation of said adjudication, at which time he first saw said account. He did not at that time know of the errors in said account above mentioned nor did he learn of the same until within the past three months. He was assured by said accountant that said account was true and correct, and relying upon the integrity of the accountant he did not investigate the truthfulness of said account until within the six months last past, with the results above stated.

7. That said accountant has retained for his own use the said sums of money unaccounted for and has been collecting the interest upon said mortgage and converting the same to his own use.

8. That the only persons affected by this petition are the said administrator, James Smith, his sureties, A. B. and C. D., and your petitioner.

Wherefore, your petitioner prays your Honorable Court to award a citation, directed to the said James Smith, commanding him to appear and to show cause why said confirmation of said account should not be opened, reviewed and set aside, and said account corrected by surcharging the said administrator with the sums and security not included in his said account.

And your petitioner will ever pray, etc.

JOSEPH SMITH.

CITY AND COUNTY OF PHILADELPHIA, *ss.:*

Joseph Smith, the above-named petitioner, being duly sworn according to law, doth depose and say that the facts set forth in the foregoing petition and the allegations of errors therein contained are true.

Sworn to and subscribed this day of February, 1893.

DECREE.

And now, , 1893, upon consideration of the foregoing petition and on motion of E. F., *pro* petitioner, it is ordered and decreed that the prayer of said petition be granted and that a citation issue, directed to the said James Smith to appear and show cause why the decree of confirmation of the account of the said

James Smith, administrator of the estate of John Smith, deceased, should not be opened, reviewed and set aside, and said account corrected by surcharging said administrator with the sums and security not included in his said account.

Citation returnable at . a. m.

(Initials of Judge.)

§ 4960 Form of Answer to the Foregoing Petition.

(Caption.)

To the Honorable, the Judges of the said Court:

The answer of James Smith to the petition of Joseph Smith, praying for a review of the account of respondent, administrator of said decedent, etc.

1. I admit the averments contained in paragraph 1 of said petition.

2. I admit the averments contained in paragraph 2 of said petition.

3. I admit the averments contained in paragraph 3 of said petition.

4. I admit the averments contained in paragraph 4 of said petition.

5. I deny that said account contained the errors alleged in the fifth paragraph of said petition or that said account contained any error or errors whatsoever. I deny that I ever received one thousand dollars or any other sum from said Insurance Company as alleged in said paragraph 5, and I aver that said policy referred to by the petitioner was in favor of Sarah Smith, the beneficiary therein named, who collected the proceeds of said policy from said company.

I deny that I neglected to account for any mortgage held by said decedent and to which his estate would have been entitled, and I aver that the mortgage referred to in said paragraph was held by said decedent as trustee for , who is alone interested in said mortgage.

I deny that I ever received from the said more than the two hundred dollars included in said account.

6. I deny that the petitioner was absent from the City of Philadelphia when said aecount was filed. I deny that said account is incorrect or untrue in any particular. I aver that I handed the

petitioner a correct copy of said account the day the same was filed, and that I subsequently mailed to him by registered letter a notice of the time and place for audit. The petitioner had every opportunity of investigating the truth of said account. After the said absolute confirmation I paid the petitioner the sum to which he was entitled and hold his receipt in full, together with a full and complete release. The decree in his favor has been satisfied of record.

7. I deny the averments contained in paragraph 7 of said petition and I further deny the right of said petitioner to the relief prayed for.

Wherefore, I pray that said petition be dismissed.

JAMES SMITH.

(Affidavit of truth of answer.)

The foregoing petition and answer raising questions of fact, the petitioner should file a general replication. An examiner can then be appointed. Upon filing of his report the proceedings would be argued before the court and the petition granted or dismissed as the facts would warrant.

A petition and answer raising purely questions of law could be ordered down upon the argument list and disposed of without reference to an examiner.

CHAPTER XVIII.

CONCLUSIVENESS OF DECREES OF ORPHANS' COURT.

§ 4961

The Act of March 29, 1832, §2 (Br. Purd., 1279, §3), already quoted in the chapter on "Jurisdiction," declares that the Orphans' Court is "a court of record "with all the qualities and incidents of a court of "record at common law; its proceeding and decrees "in all matters within its jurisdiction shall not be "reversed or avoided collaterally in any other court." Provision is then made for reversal in the Supreme Court.

§ 4962 **No Action of Debt Will Lie.**

Notwithstanding the broad language of the act cited, it was held in *Eichelberger* vs. *Smyser*, 8 W., 181 (1839), that an action of debt would not lie upon its judgment.

No provision has been made for a *scire facias* to revive. *Weyand's Appeal*, 62 Pa. St., 198 (1869).

§ 4963 But a Transcript May be Filed in Common Pleas and Sci. Fa. Issued.

The Act of March 29, 1832, §29 (Br. Purd., 551, §216), cited in chapter on "Executions," provides for filing in the Common Pleas certified transcripts of amounts due by any executor, etc., which thereupon become liens for five years. *Scire facias* may issue, etc. See chapter on "Executions."

§ 4964 Not a Court of General Jurisdiction.

The Orphans' Court possesses only the powers conferred by statute. *Franks* vs. *Groff*, 14 S. & R., 181 (1826); *Weyand* vs. *Weller*, 39 Pa. St., 443 (1861).

For a full discussion of questions of jurisdiction see chapter on "General Jurisdiction."

§ 4965 The Orphans' Court is a Court of Record.

What is exactly meant by the expression "court "of record" has been the subject of some debate. The right to fine and imprison for contempt was at one time conclusive evidence that the court was a court of record; and it was said that the erection of a new tribunal with this power rendered it *ipso facto* a court of record. But it is clear that every court of record does not possess this power. So, too, the mere fact that a record is kept does not define the character of the court. Probate and many courts of limited jurisdiction keep records, and yet are held not to be courts of record. The best definition seems to be this: "A "judicial organized tribunal having attributes and "exercising functions independently of the person "of the magistrate designated generally to hold it,

"and proceeding according to the course of the com-
"mon law." (Bouvier's Law Dict'y., Vol. I, 384.)

Under the Act of 1832 it is declared that the decree in all matters within the jurisdiction of the court shall not be reversed or avoided collaterally in any other court.

§ 4966 The Court Itself Can Correct its Own Decrees.

The statute in nowise interferes with the power inherent in every court to correct its mistakes. The act simply prohibits the interference of any *other* court, save the Supreme Court, in the exercise of its appellate jurisdiction ; but after the lapse of five years, title having vested upon confirmation of a sale, it was held that the court could not set aside the sale and order a new sale. *Lockhart* vs. *John*, 7 Pa. St., 137 (1847).

It may be observed that the record and decree are conclusive, both as to matters of fact and matters of law, unless amended or corrected. It is the inherent right of every court to revise and modify its decree if injustice has been done by inadvertence, unavoidable absence of parties, a misapprehension of the law or where material evidence is discovered subsequent to hearing, if the application be made in proper time. Clerical errors and omissions may be corrected by the court upon motion and notice or petition *during the term*. But the court has no right to change or alter its decree entered in an adverse proceeding *after the end of the term* at which it was entered. *McCullough's Estate*, 47 Leg. Int., 213 (1890) ; *King* vs. *Brooks*, 72 Pa. St., 364 (1872) ; *Mathers* vs. *Patterson*, 33 Pa. St., 487 (1859) ; *Ullery* vs. *Clark*, 18 Pa. St., 148 (1851).

This can then only be done by bill of review.

In cases of default or mistake of fact a petition for a rehearing setting forth the grounds for the application should be presented under oath.

For error appearing in the body of the decree and for new matter which has arisen since the decree, a bill of review is a matter of right. For after discovered evidence a bill of review may be allowed *ex gratia.* See chapter "Bills of Review."

In order to be conclusive, the decree must be "in a matter *within* the jurisdiction" of the court. In other words: *If the court has jurisdiction, its decree cannot be collaterally impeached.*

Jurisdiction is, of course, an essential requisite to the validity of all judicial proceedings. Without it the case is said to be *coram non judice.* The want of jurisdiction can be alleged at all times, in all places, and before all tribunals. If successfully asserted, the entire proceeding falls.

Before the Act of 1832 it was ruled that the decrees of the court could be questioned in actions of ejectment. *Messinger* vs. *Kintner*, 4 Binn., 103 (1811); *Fogelsonger* vs. *Somerville*, 6 S. & R., 267 (1820); *Stoolfoos* vs. *Jenkins*, 8 S. & R., 173 (1822).

A more just view was taken in *McPherson* vs. *Cunliff*, 11 S. & R. 422 (1824).

§ 4967 When Decrees are Conclusive.

In the following cases the decrees have been held *conclusive*, and have precluded attack in any collateral proceeding.

A decree in partition. *Herr* vs. *Herr*, 5 Pa. St., 428 (1846); *Snevily* vs. *Wagner*, 8 Pa. St., 396 (1848); *Welty* vs. *Ruffner*, 9 Pa. St., 224 (1848);

Ihmsen vs. *Ormsby*, 32 Pa. St., 198 (1858); *Merklein* vs. *Trapnell*, 34 Pa. St., 42 (1859); *Waters* vs. *Bates*, 44 Pa. St., 473 (1863).

A decree upon the settlement of an administration account. *McFadden* vs. *Geddis*, 17 S. & R., 336 (1828); *McLenachan* vs. *Commonwealth*, 1 Rawle, 357 (1829); *App* vs. *Dreisbach*, 2 Rawle, 287 (1830); *Comm.* vs. *Moltz*, 10 Pa. St., 527 (1849); *McFarland's Estate*, 1 Phila., 378 (1851).

A decree confirming the account of an executor or trustee. *Moore's Appeal*, 10 Pa. St., 435 (1849); *Helfenstein's Estate*, 135 Pa. St., 293 (1890).

A decree awarding an order of sale for the payment of debts and provision for minors. *McPherson* vs. *Cunliff*, 11 S. & R., 422 (1824); *Kennedy* vs. *Wacksmuth*, 12 S. & R., 171 (1824); *Klingensmith* vs. *Bean*, 2 Watts, 486 (1834); *Snyder* vs. *Markel*, 8 Watts, 416 (1839).

A decree confirming a sale for the payment of debts. *Iddings* vs. *Cairns*, 2 Grant, 89 (1853); *Richter* vs. *Fitzsimmons*, 4 Watts, 251 (1835).

A decree directing a private sale. *Gilmore* vs. *Rodgers*, 41 Pa. St., 120 (1861).

A decree confirming an Orphans' Court sale. *Gallaher* vs. *Collins* 7 W., 552 (1838); *Dixcy* vs. *Laning*, 49 Pa. St., 143 (1865).

A decree directing payment. *Roy* vs. *Townsend*, 78 Pa. St., 329 (1875); and distribution, *Bradshaw's Appeal*, 3 Grant, 109 (1861); *Kline's Appeal*, 86 Pa. St., 363 (1878); *Howell's Estate*, 5 W. N., 430 (1878).

A decree against the claim of a creditor. *Prowathin* vs. *O'Brien*, 1 W. N., 155 (1875).

A decree for the removal of an executor. *Buehler* vs. *Buffington*, 43 Pa. St., 278 (1862).

A decree dismissing a trustee, on his own petition. *Johnson's Appeal*, 9 Pa. St., 416 (1848).

A decree directing a trustee to execute a mortgage. *Leedom* vs. *Lombaert*, 80 Pa. St., 381 (1876); *Morgan's Appeal*, 110 Pa. St., 271 (1885).

A decree dismissing exceptions and confirming a report unless appealed from. *Myers* vs. *Kingston*, 126 Pa. St., 582 (1889).

A decree of specific performance. *Nelson* vs. *Nelson*, 117 Pa. St., 278 (1887).

A decree awarding a fund to an assignee of a distributee as against an attaching creditor. *Otterson* vs. *Gallagher*, 88 Pa. St., 355 (1879); but this does not preclude the question of the *bona fides* of the assignment in a collateral suit. *Middleton* vs. *Norcross*, 11 W. N., 321 (1881); see *McGettrick's Appeal*, 98 Pa. St., 9 (1881).

A decree against the principal in a proceeding against the sureties. *McMicken* vs. *Comm.*, 58 Pa. St., 214 (1868); *Hartzell* vs. *Comm.*, 42 Pa. St., 453 (1862); *Comm.* vs. *Rhoads*, 37 Pa. St., 60 (1860); *Moorhead* vs. *Comm.*, 1 Grant, 213 (1855).

This branch of the law might be extended into kindred subjects and the same doctrine found.

The decree of a Register probating a will both as to realty and personalty cannot be collaterally attacked. *Hess* vs. *Hess*, 5 W., 187 (1836); *Carpenter* vs. *Cameron*, 7 W., 51 (1838); *Loy* vs. *Kennedy*, 1 W. & S., 396 (1841); *Shermer's Appeal*, 44 Pa. St., 39 (1863); *Frey* vs. *Klebe*, 36 Leg. Int., 114 (1879); *Wilson* vs. *Gaston*, 38 Leg. Int., 43; 92 Pa. St., 207 (1880); *Shoenberger's Estate*, 27 W. N., 129 (1891); and this is true as to all persons, whether *non compos*, *feme covert* or infants, unless contested in five years. *Warfield* vs.

Fox, 53 Pa. St., 382 (1866); *Folmar's Appeal*, 68 Pa. St., 482 (1871); and the decree of a Register refusing probate cannot be attacked collaterally. *McCay* vs. *Clayton*, 119 Pa. St., 133 (1888).

A decree secured by fraud or collusion may be attacked on that ground. *Meckley's Appeal*, 102 Pa. St., 536 (1883); *Biddle* vs. *Tomlinson*, 115 Pa. St., 299 (1886).

§ 4968 Although the Decree be Clearly Voidable, it Cannot be Impeached Collaterally.

In *Painter* vs. *Henderson*, 7 Pa. St., 48 (1847), a very plain error appeared. The partition Act of March 29, 1832, gave the court the power to award the land in a certain case to the heirs. The Orphans' Court decreed the real estate to the widow. It was held that this was clearly erroneous and voidable; but as the court had jurisdiction of the partition, it was ruled that this question could not be reviewed collaterally. So, too, the Act of March 29, 1832, §33, provided that no order of sale shall be granted until the administrator has given bond, etc. It was held that *the omission to order security is error*, but not sufficient ground for collateral attack. *Lockhart* vs. *John*, 7 Pa. St., 137 (1847).

§ 4969 The Decree Against an Administrator is Conclusive as to His Sureties.

In *Garber* vs. *The Comm.*, 7 Pa. St., 265 (1847), the court said: "That the decree is conclusive would "seem to be settled by the Act of March 29, 1832."

The sureties can appear in the Orphans' Court, make defence and appeal.

§ 4970 Omission to Notify.

In *Welty* vs. *Ruffner*, 9 Pa. St., 225 (1848), the vendees of one of the heirs were not notified of the partition proceedings. The conveyance was after the filing of the petition, and the party in interest at that date was notified.

GIBSON, C. J.: "Even if the supposed irregularity "would be fatal to the sale on appeal, it would not "affect the validity of it in a collateral action."

The general principle as to conclusiveness of the decree is re-affirmed in *Keech* vs. *Rinehart*, 10 Pa. St., 242 (1849). But that case simply presented a question as to whether the settlement of an administration account "is to be accepted as settling every question "that may arise upon the items incidentally intro-"duced into it." It was ruled that the confirmation did not have that effect.

§ 4971 Notice Must Be Served.

The case above noted, *Welty* vs. *Ruffner*, 9 Pa. St., 225 (1848), was followed two years afterwards by another upon the same question, viz., the want of notice.

In *Welty* vs. *Ruffner* the point ruled was that notice having been given to all parties when the partition was commenced, the *actor* was not bound to notify vendees of one of the persons notified. The party complaining had not even recorded the deed.

But this case must not be supposed to rule that where notice is necessary and the record shows that no notice has been given, a decree entered can stand.

McKee vs. *McKee*, 14 Pa. St., 231 (1850), was an application to the Orphans' Court to decree specific performance of a parol contract for the purchase of land.

Under the Act of February 24, 1834, §15, notice must be given to the heirs to appear on a day certain and answer.

The petitioner secured the appointment of a guardian *ad litem* of the minors, and a reference to a commissioner to take depositions. He thereupon notified the guardian, of the petition and of the day fixed for taking the depositions. But no day was named for the minors' appearance, nor were they required to appear and answer.

On the filing of the depositions, the court adjudged the proofs sufficient. The administrator, under leave granted, made a deed, received the purchase money, and it was distributed, amongst others, to the guardian. When the records of these proceedings were offered, objection was made to the omission of the day to appear and of notice to answer. As to receipt of the money it was said, "The guardian of "plaintiffs could not, by receiving the money upon "totally defective proceedings, divest the interest of "the wards."

These objections were sustained in the court below and its judgment was affirmed.

The Supreme Court said (p. 238), "The power "to divest men of their estates and transfer them to "others is a momentous one, to be exercised with "great care and caution. Before it can be made "effective, the court must possess itself not only of "the subject, but of the person whose interests are to

"be dealt with, and after this the proper decree must "be pronounced."

It will be noted that the Orphans' Court did not make, in this case, a decree for specific performance, nor, indeed, any decree. The necessity for notice is regarded as an axiom of natural justice, and of universal application.

CHAPTER XIX.

COSTS.

§ 4972

The history of the allowance of costs is given in Brewster's Practice, Vol. II, Chap. XLIII. A number of cases are there cited.

For costs in equity and the *equity fee bill* see that chapter.

§ 4973 **The Fees of the Clerks of the Orphans' Courts,** except in counties having more than one hundred and fifty thousand or less than ten thousand inhabitants, are fixed by Act of June 12, 1878, §7 (Br. Purd., 783).

For filing and entering petition for appointment of guardian and issuing certificate of appointment,	$ 75
Filing and entering list of property selected and retained by widow under Act of Assembly,	40
Entering judgment, order, or rule of court,	20
Confirmation of accounts of executors, administrators or guardians,	1 00
Filing petition for pension, order, copy and seal,	40
All proceedings on inquisition on real estate, including petition, order, return, confirmation, rule and recording,	2 25
Taking and docketing recognizances,	25
All proceedings for sale of real estate,	3 00
Filing and entering bond,	20

Entering motion and rule of court thereon,	$ 20
Issuing subpœna and seal,	25
Each name after the first,	02
Issuing citation with seal and recording or filing petition therefor,	40
Issuing attachments with seal and recording or entering petition therefor,	40
Copy of record or any paper filed or any part thereof for every ten words,	01
Every search, where no other service is performed to which fee is attached,	15
Filing any paper not specially provided for,	10
Recording a draft,	20
Making out order under seal to auditors appointed to apportion intestate's property among creditors and to auditors appointed to settle and adjust accounts of administrators, executors or guardians,	75
Filing auditor's report and entering approval of court thereon,	15
Copy of said report for either party, each item,	01
Accounts of administrators, executors, guardians and auditor's reports, for every ten words or every twenty figures,	01
Certificate seal,	25

Same fee for services not herein specially provided for as for similar services.

§ 4974 Separate Orphans' Courts May Establish Register's Fee Bill.

The Act of March 24, 1877, §1 (P. L., 37); (Br. Purd., 783, §21), provides:

In counties wherein separate Orphans' Courts are now or may be established, the said courts shall establish a bill of costs, to be

chargeable to parties and to estates, for the probate of wills and testaments, and granting of letters testamentary or of administration, and for all the services of the Register of Wills of such county in the transaction of the business of his office, provided the tax to be paid to and received by the Register for the use of the Commonwealth shall not be less than the sum now or hereafter fixed by law.

§ 4975 Fee Bill of Register of Wills of Philadelphia.

Administering oath or affirmation,	$ 25
Citation or attachment,	1 00
Commission to take testimony of witnesses,	5 00
Certified copy of will, inventory and appraisement or account, per page of cap or brief paper,	50
Certified copy of bond,	1 00
Certificate and seal,	1 00
Certifying record to Orphans' Court and on appeal,	5 00
Entering caveat,	50
Entering exceptions to administrators' or executors' bonds and hearing same,	1 00
Filing renunciation of widow, executor, guardian or administrator,	50
Filing, advertising and recording accounts of executors, administrators, trustees and guardians in estates not exceeding $250 in value,	6 50
Between $250 and $1,000,	8 50
" 1,000 " 5,000,	13 50
" 5,000 " 10,000,	18 50
" 10,000 " 100,000,	23 50
And over $100,000,	28 50

The above fees include the advertising of audit notices.

Filing inventory and appraisement,	50

Recording inventory, per page, or fraction of a page, in addition to the fee for filing, .	$ 50
Letters of administration in estates not exceeding $250, ...	3 00
Between $250 and $1,000, . . .	5 00
" 1,000 " 5,000, . . .	8 50
" 5,000 " 10,000, . . .	13 50
" 10,000 " 100,000, . . .	18 50
And over $100,000, ...	23 50
Including filing and entering bonds and tax due the Commonwealth, . . .	50
Precept for an issue, ...	5 00
Probate of will and granting letters testamentary in estates not exceeding $250 in value, ...	3 50
Between $250 and $1,000, . . .	5 50
" 1,000 " 5,000, . . .	10 50
" 5,000 " 10,000, . . .	15 50
" 10,000 " 100,000, . . .	20 50
And over $100,000, ...	25 50
Including tax due Commonwealth, . .	50
Recording exemplified copies of letters of administration from other States, etc., where letters of administration are not required to be issued, ...	3 50
Recording exemplified copies of wills from other States, etc. where letters testamentary or of administration c. t. a., are not required to be issued, . . .	3 50
Recording exemplified copies of wills from other States, etc., where letters testamentary or of administration c. t. a., are not required to be issued, exceeding ten pages, ...	5 00

Recording wills of decedents of this county and probating the same when no letters are taken out in this county, per page, .	$ 50
Filing exemplified copies of letters of administration, etc., from other States, etc., where it is unnecessary to record the same, ...	1 50
Filing exemplified copies of wills from other States, etc., where it is unnecessary to record the same, ...	1 50
Filing and entering bond where additional security is required, ...	2 00
Search and certificate, ...	50
Short certificate, ...	50
Subpœna, ...	25

§4976 Dockets of Registers and of Clerks of Orphans' Courts.

The books hereafter to be purchased by the Register and Clerk of the Orphans' Court for the records of their offices, shall be paid by orders drawn by the County Commissioners of the proper county, on the Treasurer thereof. (Act February 22, 1821, §8, 7 Sm., 373; Br. Purd., 783, §20.)

How Register May Collect His Costs.

The Act of March 15, 1832, §38, (P. L., 145; Br. Purd., 1476, §17), provides:

Whenever any proceedings before a Register (or Register's Court) shall be wholly ended and the fees and costs accrued thereon shall remain during the space of thirty days thereafter due and unpaid, such Register may file a bill thereof, under his hand and the seal of his office, in the Court of Common Pleas of the county; and upon the docketing thereof an execution may be issued, in the name of the Commonwealth, to levy the amount of the said bill in

like manner as executions may issue to levy costs accrued in the courts of common law, and subject in like manner to control and taxation by the said court.

By Act of March 18, 1875, §1 (P. L., 29; Br. Purd., 1281, §22), the judges of the separate Orphans' Courts are required to establish a bill of costs, "to be "chargeable to parties and the estates before them "for settlement, for the services of the Clerks of said "courts, respectively, in the transaction of business "of said courts."

§4977 Fee Bill of Clerk of Orphans' Court in Philadelphia.

Account, order to file,	$1 00
Account, certified copy of, per page,	50
Acknowledgment of deed,	50
Adjudication of each account,	
Not exceeding $100,	1 00
And for each additional $100, to not exceeding $900,	1 00
Between $900 and $10,000,	10 00
" $10,000 and $100,000,	15 00
Over $100,000,	20 00
Adjudication, certified copy of, per page,	50
Affidavit,	25
Appearance bond on attachment,	2 00
Appeal to Supreme Court, certificate of record and bond,	5 00
Attachment, rule for,	1 00
Attachment,	1 00
Auditor's report, certified copy of, per page,	50
Auditor's report, filing,	1 00
Auditor's report, recording, per page,	50
Certificate,	1 00

Certificate, duplicate,	$ 50
Citation,	1 00
Commitment,	1 00
Decree, certified copy of, per page,	50
Examiner's report, certified copy of, per page,	50
Examiner's report, filing,	5 00
Exemplification of record, per page,	50
Fieri facias,	1 00
Guardian, petition for appointment of, filing and bond,	
If only one minor,	2 50
If more than one minor, for first bond,	2 00
Each succeeding bond,	1 00
Injunction, filing bond,	2 50
" order in nature of,	1 00
Inquest, one description,	5 00
Each additional description,	50
Inventory, guardians',	50
Marriage license,	50
Master's report, filing,	5 00
Minor's certificate and oath,	50
Money paid into court :—	
Commissions one per cent. up to $1,000, and one-half per cent. on any excess of $1,000.	
Mortgage, filing petition and bond for leave to,	2 50
Order to file account,	1 00
Order to pay,	1 00
Order of sale, one description,	3 00
Each additional description,	50
Order of sale, certified copy of, per page,	50
Petition, certified copy of, per page,	50
Purchase money, filing petition and bond for,	2 50
Refunding bond,	2 50

Rule for attachment,	$ 1 00
Sale, petition for, filing and taking bond,	2 50
Students, certificate of preliminary examination,	25
Students, application for admission and certificate,	1 00
Subpœna,	25
Trustee, petition and bond for, filing,	2 50
Trustee, filing account of:—	
Under $1,000,	8 50
Over $1,000,	13 50
Venditioni exponas,	1 00
Widow's claim for $300,	1 50

The fees to be taken by the Sheriffs for services enjoined by Act of March 29, 1832, are fixed by the sixtieth section of said act (Brightly's Purdon, 1287, §66), which is given at length in this work. Chapter, "History and Organization."

§ 4978 Executions May Issue for Costs on Interlocutory as Well as on Final Orders.

Execution process may be issued to enforce all orders of court, either final or interlocutory, for the payment of costs made in any of the courts of this Commonwealth, the same as on a judgment in the Court of Common Pleas, and shall be executed in the same manner. (Act May 3, 1889, P. L., 78.)

§ 4979 Fees of Clerks for Entering Proceedings in Partition.

These are fixed as the same fees allowed to Recorders of Deeds for recording. (Act April 4, 1889, P. L., 23; Brightly's Purdon, 2628, §6.)

By the Act of April 27, 1864, §1 (P. L., 641), (Br. Purd., 1295, §35), the costs in partition, with a reasonable counsel fee, are to be paid from the fund.

The Act of May 23, 1871, §1 (P. L., 274), (Br. Purd., 549), §201, permits the Orphans' Court to order the costs upon a sale of the decedent's real estate, with an allowance to the administrator, executor or trustee, to be paid when the sale is confirmed.

§ 4980 General Rules as to Liability for Costs.

The Orphans' Court has complete control of all questions as to costs. The rejection of a claim does not of itself carry costs. *McCullough's Estate*, 47 Leg. Int., 213 (1890).

Costs of the audit are imposed according to the equities of the case. *Riddle* vs. *Witcraft*, 3 Kulp, 186 (1884).

The general rule is to give the successful party his costs. Where some exceptions to an account are sustained and others dismissed, the costs may be apportioned. *John's Estate*, 2 Chest. Co. Rep., 281 (1884); *Graham's Estate*, 1 Del. Co. Rep., 393 (1884).

Costs in equity are discretionary. Application to impose the costs upon a claimant who has ordered a fund into court should be made to the auditor, and not to the court direct. *Dinsmore* vs. *Davis*, 7 W. N., 295 (1879).

But while it is true that costs in equity are largely within the court's discretion, they are not arbitrarily to be withheld from the successful party. *Biddle's Appeal*, 19 W. N., 219 (1887).

Nor do they necessarily fall upon the wrong party. *O'Hara* vs. *Stack*, 90 Pa. St., 477 (1879); *Stokely's Estate*, 19 Pa. St., 477 (1852).

The costs of audit are largely within the discretion of the Orphans' Court. *Lusk's Estate*, 150 Pa. St., 517 (1892); *Toomey's Estate*, 150 Pa. St., 535 (1892).

§ 4981 In Issues d. v. n.

A judgment on a verdict in an issue d. v. n. is to be entered with costs, as in other cases.

A reversal by the Supreme Court of a judgment in such case, with costs, includes the costs in the Common Pleas and in error, but not the costs before the Register. *McMasters* vs. *Blair*, 31 Pa. St., 467 (1858).

Executors are mere stakeholders and it is their duty before taking part in a contest *devisavit vel non*, to call upon the parties interested in the establishment of the will to indemnify them against costs and expenses; they will not be allowed credit for such costs and expenses. *Rankin's Estate*, 9 W. N., 407 (1880); *Neal's Estate*, 18 W. N., 85 (1886).

The right of an executor to costs in an issue *devisavit vel non*, depends on whether the litigation is for the benefit of those entitled to the estate of decedent.

An executor will not be allowed counsel and witness fees expended by him in attempting to support a forged will. *Sheetz's Appeal*, 100 Pa. St., 198 (1882).

§ 4982 Decisions as to Costs.

A widow elected to retain real estate to the value of three hundred dollars, and it was set apart to her, subject to the lien of a mortgage. The property was subsequently sold under a *lev. fa.* sur the mortgage

for a sum less than the judgment. The widow then claimed against the fund and the question was referred to an auditor. Her claim being unwarranted, the costs of audit were imposed on her. *Kauffman's Appeal*, 112 Pa. St., 645 (1886).

Where a husband elects to take against the wife's will, the ordinary costs of administration should be paid out of the estate, but his share should not be thus burdened. *McDonald's Estate*, 37 Pitts. Leg. Jour., 275 (1890).

Where the necessity for litigation upon the part of a ward against his guardian is due to the default of the guardian, the costs of the proceeding will be imposed on the guardian. *Simon's Appeal*, 19 W. N., 94 (1887).

Where a trustee fails to file an account until compelled to do so by the *cestui que trust*, and this is followed by extended litigation resulting favorably to the *cestui que trust*, the court will impose the costs on the trustee. *Taylor's Appeal*, 21 W. N., 357 (1888).

This same doctrine exists where a guardian is responsible for litigation. *Born's Estate*, 16 W. N., 68 (1885).

Costs in the Orphans' Court in cases not involving fraud or breach of trust on the part of the losing party, cannot be enforced by attachment. *Tarr's Estate*, 20 W. N., 320 (1887).

Nor in such cases can the fees of a master in equity be collected by attachment. *Pierce's Appeal*, 103 Pa. St., 27 (1883).

Where a petition is presented for allowance to a minor, under advice of counsel, if the petitioner do not wish to press the matter, the proper practice is to ask for leave to withdraw the petition and vacate the

appointment of examiner and master, otherwise costs will be imposed. *Wertz's Estate*, 44 Leg. Int., 253 (1887).

The expenses incident to the sale of real estate cannot be regarded as "costs of administration," in the sense of being chargeable in the first instance upon personalty. The costs of raising a fund, including counsel fees, auctioneer's charges, accountant's commissions, etc., fall upon the fund itself. *Teaf's Estate*, 26 W. N., 310 (1889).

It is the general practice to file a bill of costs for the attendance of witnesses, yet in the audit and settlement of accounts, the practice is for the Auditing Judge, at the time an award is made or credit allowed accountant, to deduct and direct payment of the witness fees, if properly chargeable on the fund. *Rankin Estate*, 45 Leg. Int., 174 (1888).

Upon an execution to enforce an order to pay costs, the defendant is entitled to claim the exemption provided by the Act of 1849. *Taylor's Estate*, 48 Leg. Int., 25 (1891).

Where an examiner, with consent of the parties, employs a stenographer, under the Act of May 24, 1887, §6 (P. L., 200), the stenographer's reasonable charges are taxable as costs. But copies of the evidence furnished counsel must be paid for by the parties ordering them. *Drinkhouse's Estate*, 30 W. N., 306 (1892).

Where a guardian settled his account out of court, and the ward subsequently endeavored, but unsuccessfully, to surcharge him, the guardian was allowed the costs of audit. *Roth's Estate*, 150 Pa. St., 261 (1892).

The question of liability for costs should be raised before the auditor or in the lower court, and not, for the first time, in the Supreme Court. *Patrick's Appeal*, 105 Pa. St., 356 (1884); *Fotter* vs. *Langstrath* (*Luken's Appeal*), 151 Pa. St., 216 (1892).

A testator may provide that the costs and expenses of a contest over his will shall be paid by any beneficiaries so contesting. *Fow's Estate*, 30 W. N., 418 (1892).

The action of a lower court in taxing costs will not be reviewed by the Supreme Court, except in a flagrant case. *Miskey's Appeal*, 18 W. N., 100 (1886).

§ 4983 Pleadings in Equity to be Printed—Amount Paid to be Allowed as Costs, Except in Case of Poverty.

Rule III, §14, Equity Rules, provides:

All bills, interrogatories, demurrers, pleas, answers to bills and to interrogatories, and amendments of pleadings, where such amendments exceed one hundred consecutive words, shall be printed on white sized paper of a convenient size. Amendments shall be printed on one side only of the paper. Each party appearing by separate counsel shall be entitled to ten copies of all such pleadings. The amount paid for printing shall be allowed as costs of the cause. This rule shall not apply where counsel shall certify that his client, by reason of poverty, is unable to pay for the same. * * *

§ 4984 Auditors, Examiners and Masters May Require Security for Their and the Clerk's Costs.

Rule V, §10, provides:

Auditors and masters and examiners appointed by this court may at any time, with the leave of the court, require security for

the payment of their and the Clerk's costs, and may decline to proceed further until such security be entered. No report of an auditor or master and examiner shall be confirmed absolutely until all the costs of the reference, including the costs of the auditor or master and examiner be paid.

§ 4985 Security for Costs.

A non-resident heir who takes an appeal from the probate of a will must give security for costs. *Lehman's Estate*, Register's Court of Phila., Sept. 4, 1847, MS. The application for security should be made promptly. *Rea's Estate*, 12 W. N., 306 (1882), and should be by petition. *King's Estate*, 9 W. N., 207 (1880).

See Chapter on "Feigned Issues," Brews. Prac., as to security for costs upon appeals from Registers.

In *Voight* vs. *Pfaffle*, 16 W. N., 47 (1885), a non-resident complainant in equity was compelled to give security for costs, and in *Tyndall's Assigned Estate*, 6 W. N., 562 (1879), a non-resident petitioner who disputed the assignee's right of appointment was ordered to enter security.

Both plaintiff and defendant being non-residents, the former was not compelled to enter security for costs. *Tyler* vs. *Bannon*, 30 W. N., 372 (1892).

Where a creditor is about to issue a commission he cannot be compelled to give security for costs. An administrator in such case will be entitled to costs only after he has filed cross-interrogatories or issued a second commission. *McCullough's Estate*, 20 W. N., 471 (1888).

In the absence of any rule upon the subject, a non-resident claimant petitioning the Orphans' Court

for a citation to file an account, need not give security for costs. *Buckwalter's Estate*, 6 C. C. Rep., 20 (1888).

A plaintiff need not give security merely because he has no real or personal property from which the costs could be collected, should the case be decided against him. *Staley* vs. *Oller*, 28 P. L. J., 131 (1888).

It was held in *Brace* vs. *Evans*, 36 P. L. J., 88 (1888), that in no case except replevin, can a defendant be required to enter security for costs. That no costs can be collected in equity unless decreed by the court.

CHAPTER XX.

EXECUTION.

§ 4986 Orphans' Court May Enforce its Decrees.

As a general rule the Orphans' Court is empowered to enforce its decrees. An action upon any such decree does not lie in another court except in the case of a transcript showing a balance due against an accountant, whereon actions of debt or *sci. fa.* may be instituted.

Where, however, the action is against a surety on a bond, the remedy is in the Common Pleas.

§ 4987 General Practice.

Writs of execution are secured by petition, and upon being granted by the court are issued by the Clerk. Real estate as well as personal property may be sold. The writs follow the Common Pleas forms with necessary modifications.

The practice is borrowed from chancery. A petition for an order to pay is presented, and being granted, a certified copy of the order is served personally on the respondent; on his failure to comply therewith, a petition for a writ of execution is presented, showing personal service of the order, with a demand and refusal to comply therewith on the part of the respondent.

§ 4988 Attachment—Sequestration—Power to Issue.

Compliance with an order or decree of the court may be enforced by attachment or sequestration * * * which writs may be allowed by the court or by any Judge thereof, in vacation. (Act March 29, 1832, §57, Br. Pur., 1283, §40).

The Orphan's Court has power to issue a writ of attachment for disobedience to its decree. *Tome's Appeal*, 50 Pa. St., 285 (1865).

It may be observed that the decree against a dismissed executor to pay is founded on a tort, not a contract, hence the Act of 1842 does not apply. *Chew's Appeal*, 44 Pa. St., 247 (1863); see *Scott* vs. *Jailer*, 1 Grant, 237 (1855).

The writ of attachment issues against the person of the defendant.

The purpose of the writ is to compel the performance of a duty, as to pay over and surrender trust property, and may issue against executors, administrators, guardians and other trustees.

§ 4989 When Attachment May Issue.

An attachment may issue against a female acting as an administratrix, for failure to comply with an order of court. *Klein's Estate*, 11 Phila., 34 (1875).

Where a surety on a guardian's bond paid the amount due by the guardian, he is subrogated to all the rights of the ward, including the right to enforce by attachment a decree for the payment of money to his use. *Leiter's Appeal*, 10 W. N., 225 (1881).

A decree for specific performance of a contract may be enforced by attachment. *Chess' Appeal*, 4 Pa. St., 52 (1846).

A purchaser at a sale in partition may be compelled, by attachment, to comply with his bid. *Hore's Estate*, 32 Leg. Int., 135 (1875).

An attachment may issue against the administrator of a guardian, who has settled the guardian's account, to enforce payment of a balance in hand. *Bowman* vs. *Herr*, 1 P. & W., 282 (1830).

The payment of owelty in partition may be enforced by attachment. KENNEDY, J. *Sampson's Appeal*, 4 W. & S., 86 (1841).

§ 4990 When Attachment Will Not Issue.

An attachment will not issue for failure to obey a citation to produce an alleged will; the petitioner will be remitted to an indictment or action for damages provided by the Act of March 15, 1832. *McDonald's Estate*, 38 Leg. Int., 34 (1881).

Where an executor's account, as stated by the executrix of such executor, showed a balance due the original decedent, an attachment against such executrix to compel payment of the amount due was refused until an account had been filed in the executor's estate. *Goldsmith's Estate*, 9 W. N., 276 (1880).

It will not lie to enforce payment of the executor's personal debt to the estate, where he is insolvent. *Royal's Estate*, 40 Leg. Int., 171 (1883).

An attachment was refused against a respondent who had lost his equity suit and failed to pay the costs. *Cochran* vs. *Gowen*, 9 Phila, 299 (1874).

§ 4991 Practice on an Attachment.

A petition for an order to pay should be presented in the first instance and a certified copy of the

order should be served personally on the executor or administrator ten days before the return day. *McKinney's Estate*, 2 W. N., 156 (1875); *Killiams' Estate*, Id., 684 (1876).

A return under oath must be made of the time and mode of service. *Chew's Estate*, 3 W. N., 392 (1877).

Form of Petition for Order to Pay, see §4341.

Form of Return to Order to Pay, see §4343.

If the respondent fail to comply with the terms of the order, at the expiration of the time indicated in the order, present with the return to the order, a petition for an attachment. *Thomas' Estate*, 4 Kulp, 445 (1887).

§ 4992 Form of Petition for an Attachment—See §4346.

The petition being granted, a citation issues returnable sec. leg. Serve the citation and petition upon the respondent.

Before the return of the citation the respondent may file an answer.

§ 4993 Subsequent Proceedings.

The attachment will fall where the administrator shows that the non-payment of money, for which the writ issued, was received by his attorney and misappropriated by him. *Hamilton's Estate*, 4 W. N., 204 (1877). See *Schadewald's Estate*, 6 Id., 96 (1878); or where he shows the embezzlement was by his surety, and his inability to pay. *Stevenson's Estate*, 7 W. N., 65 (1879).

On the return of the citation and no answer being filed, a writ of attachment may issue, directed to the Sheriff, returnable forthwith.

If an answer be filed and the court regards it as clearly insufficient, a writ of attachment may be immediately granted. The court in its discretion may order the petition and answer on the next argument list.

When the writ issues the Sheriff brings the defendant into court and the defendant may make answer at that time why he has not complied with the decree of the court.

The petitioner may then examine the respondent on oath in open court, or he may file interrogatories which the court may require to be answered on oath.

In the discretion of the court the case may be continued for further hearing, upon the defendant entering security.

A defendant brought in on an attachment will be discharged if he purge himself on oath of the alleged contempt or from criminality. *Thomas* vs. *Cummins*, 1 Yeates, 40 (1791); *Comm.* vs. *Snowden*, 1 Brewster, 218 (1868).

When the respondent fails or refuses to comply with the decree, upon demand of the petitioner, the defendant will be committed in execution of the attachment until he obeys the order. *Comm.* vs. *Reed*, 59 Pa. St., 425 (1868).

When the defendant is guilty of a misdemeanor, the Orphans' Court may commit him for trial in the Quarter Sessions. *Ex parte Blumer*, 86 Pa. St., 372 (1878); see *Comm.* vs. *Curtis*, 37 Leg. Int., 83 (1880), and *Stevenson's Estate*, 7 W. N., 65 (1879).

§ 4994 Form of Writ of Attachment.

COUNTY OF PHILADELPHIA, *ss.*

The Commonwealth of Pennsylvania.

To the Sheriff of the said county, Greeting:

We command you to attach C. D., so as to have him before our Orphans' Court of the said county on the (date) then and there to answer us as well touching a contempt which he, as it is alleged, hath committed against us, in not (here set forth nature of contempt) as commanded by our Orphans' Court, as also such other matters as shall be laid to his charge, and further to abide the order our said court shall make in this behalf. And hereof fail not.

Witness the Honorable WILLIAM B. HANNA, President Judge of said court, at Philadelphia aforesaid, this day of , A. D., one thousand eight hundred and ninety-three.

L. M.,
Clerk of Orphans' Court.

§ 4995 Writs Must be Directed to the Sheriff, etc.

Writs of attachment and sequestration shall be directed to and executed by the Sheriff or Coroner, as the case may require, of the proper county. (Act March 29, 1832, §57; Br. Pur., 1283, §41.)

§ 4996 How Defendant May be Released After Commitment.

Where the defendant has been committed upon default in answering the petition, the proper practice is to present a petition setting forth the facts, alleging inability to comply with the order and the reasons therefor and praying that the petitioner may be permitted to come personally into court, submit to an examination under oath and purge himself of his contempt. If possible, it is better to set forth the defense in an answer in the first instance upon the return of the citation *sur* the petition to show cause why an attachment should not issue.

In *Bolton's Estate*, 37 Leg. Int., 182 (1880), the important and interesting question was raised whether an attachment having issued for a contempt, and the defendant was committed, he could thereafter be discharged by the court upon satisfying the court of his inability to pay. It was argued that the attachment being purely a civil remedy, the court had no power to discharge the defendant, the decree being in favor of the party interested.

It was decided that it was within the discretion of the Orphans' Court in such case to permit a party attached and committed, to purge himself from the contempt. ASHMAN, J.: "The true definition of the "writ would seem to be that it is a writ whose opera- "tion is two-fold, and that it is in the nature of a "remedy to compel the performance of a duty as well "as in that of a penalty for the wrong done. In the "one sense it is intended for the benefit of the party "by whom its aid is invoked and in the other for the "vindication of the court which will not permit a "wrong."

See *contra*, *Ex parte Batdorff*, 13 W. N., 417 (1883).

§ 4997 Appeal a Supersedeas.

A *certiorari* from the Supreme Court suspends the proceeding by attachment. *Shaw's Estate*, 9 Phila., 347 (1874).

§ 4998 Attachment Against Absconding Executor, etc.

The petition should follow closely the terms of the act, and the prayer should be for an attachment. See chapter "History and Organization."

§ 4999 Writ of Sequestration—Its Nature and Effect.

The writ of sequestration is generally used to enforce a compliance with some previous order or decree of the court.

It is a high and extraordinary process, founded on the principle that the defendant has contemned the authority of the State.

It empowers the proper officer to take all the personal estate of the defendant and to attach all stocks held by him in incorporated companies and to enter upon all lands, etc., and to collect the rents, issues and profits.

It may be dissolved by error in the anterior process, by extinction of defendant's interest in the estate sequestered, or by his appearance and performance of the order of the court.

In Pennsylvania the writ is demandable of right, and may issue without notice. *Reid* vs. *N. W. Railway Co.*, 32 Pa. St., 257 (1858).

The writ is now but rarely used, and has been superseded by the writ of attachment and attachment-execution.

Writ of Sequestration Against Trustee—Return of Writ—Order of Court—Satisfaction of Decree Out of Estate Sequestered—Defense—Fi. Fa., etc. See chapter on "History and Organization."

A writ of sequestration may be issued as a final process against the trust estate; the ordinary writ of execution issues only against defendant's estate.

Form of Writ of Sequestration—Writ does not Abate by Death of Complainant or Defendant—Lien Against Real Estate. See chapter on "History and Organization."

As to sequestration against corporations and proceedings and practice thereon, see §§3199–3203, Brews. Prac., Vol. II.

As to sequestration of life estates and practice thereon, see *Ibid*, §§3212–3218.

The Act of April 7, 1870, authorizing a *fi. fa.* to levy upon and sell the franchises and property of a corporation supersedes the right to the writ of sequestration. *Phila., etc., R. R. Co.'s Appeal*, 70 Pa. St., 355 (1872); *Bayard's Appeal*, 72 Pa. St., 453 (1872).

Under the above decisions the right to a writ of sequestration against a life estate may now be doubted, since under the Act of January 24, 1849, §3 (Br. Purd., 760, §98), such estate may be levied upon and sold as estates of inheritance. It will be noted that this statute, however, expressly reserves the right to a lien creditor to apply for a writ of sequestration on or before the return day of the *vend. ex.* See *Comm.* vs. *Allen*, 30 Pa. St., 52 (1858).

§ 5000 Form of Petition for Writ of Sequestration After Life Estate Levied Upon by Fi. Fa., and Ven. Ex. Outstanding.

In the Orphans' Court of Philadelphia County.

Estate of A. B., deceased.

Term, 1893. No. .

To the Honorable, the Judges of the said Court:

The petition of C. D. respectfully represents:

I.

That on the (date) the account of E. F., administrator of the estate of A. B., deceased, was filed and duly audited and the adjudication thereon, which was absolutely confirmed (date), awarded to your petitioner the sum of dollars.

II.

That on the (date) a petition for an order to pay was granted by your Honorable Court and a certified copy of said decree was (date) served personally on the said E. F., but the said E. F. has failed to comply therewith.

III.

That by virtue of a writ of *fieri facias*, bearing teste (date), on the petition of Q. R., the life estate of E. F., the defendant therein named, in a certain tract of land therein described, was taken in execution by the Sheriff: the said real estate is improved land, yielding rents, issues and profits.

IV.

That on the (date) a *ven. ex.* was issued by your Honorable Court, on the petition of Q. R., which has not yet been returned, wherein it was averred that at an inquisition held on (date) it was found that the annual rent arising from said life estate was not sufficient to pay the interest on the debts of record against the said E. F., and that the tenant for life had been given ten days' notice previous to the presentation of the said petition.

V.

That your petitioner is a lien creditor of the said E. F., as heretofore recited.

Wherefore your petitioner prays your Honorable Court to award him a writ to sequester the rents, issues and profits of the said real estate and to appoint a sequestrator to carry the same into effect.

And your petitioner will ever pray, etc.

C. D.

(Affidavit of truth of facts.)

Endorsement.

No. . Term, 1893.

Estate of A. B., deceased.

O. C.

And now (date), on consideration of the within petition and on motion of L. M., *pro* petitioner, writ of sequestration awarded as prayed for and N. O. appointed to act as sequestrator in the premises. Security to be entered in the sum of dollars.

(Initials of Judge.)

§ 5001 Form of Bond of Sequestrator.

ORPHANS' COURT OF COUNTY.

Estate of A. B., deceased.

Term, 1893. No.

Know all men by these presents, That we, N. O. (names of two sureties), all of County, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of dollars, lawful money of the United States of America, to be paid to the said Commonwealth, its certain attorneys or assigns, to which payment well and truly to be made, we do bind ourselves jointly and severally, our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated (date).

Whereas by a petition of C. D., it appeared (here briefly recite petition), the Court ordered and decreed (here recite decree) and appointed N. O. sequestrator to carry said decree into effect. Now the condition of this obligation is such that if the above bounden N. O., sequestrator as aforesaid, shall well and faithfully execute his said trust, then this obligation shall be void, otherwise to be and remain in full force.

Signed, sealed and delivered in the presence of } [SEAL] [SEAL] [SEAL]

(Present the bond, with affidavits, to a Judge for approval.

§ 5002 Exemption.

An administrator who has converted funds to his own use is not entitled to the exemption. *Woods' Estate*, 7 W. N., 84 (1879); *Kenyon* vs. *Gould*, 61 Pa. St., 292 (1869); *Kilpatrick* vs. *White*, 29 Pa. St., 176 (1857).

In actions *ex delicto*, the proper practice is to wait until the Sheriff has made an appraisement, and then to present a petition setting forth the facts and praying that the appraisement be set aside. *Woods' Estate*,

7 W. N., 84 (1879); *Seibert's Appeal*, 73 Pa. St., 361 (1873).

See also Brews. Prac., Vol. II, §§3160–3181.

§ 5003 Stay of Execution.

See Ibid, §§3149–3159, as to practice and proceedings.

§ 5004 Fi. Fa. May Issue.

Compliance with an order or decree of the court * * * in case of a decree for the payment of money against a party who has appeared, the complainant may have a writ of execution in the nature of a writ of *fieri facias*, which writ may be allowed by the court or by any judge thereof in vacation. (Act March 29, 1832, §57; Br. Pur., 1283 §40).

§ 5005 Practice.

Writs of *fieri facias* shall be directed to, and executed by the Sheriff or Coroner, as the case may require, of the proper county, and the proceedings thereon shall be the same as on writs of *fieri facias* issued by the court of Common Pleas, of the same county. (Act March 29, 1832, §57, Br. Pur., 1283, §45.)

It must be remembered that preceding the petition for the *fi. fa.*, a petition for an order to pay is required with personal service of the order on respondent. It is necessary to aver these facts in the petition. In extraordinary cases and where the respondent is a non-resident having property within the jurisdiction, the court will grant the petition for the *fi. fa.* without the previous order to pay, upon such averment under oath in the petition.

A *fi. fa.* may issue out of the Orphans' Court after a lapse of five years without the decree being revived by a *sci. fa. Weyand's Appeal*, 62 Pa. St., 198 (1869).

But see the Act of May 19, 1887, Brews. Prac., Vol. I, §247.

A writ of *fi. fa.* may be awarded in favor of a guardian against a ward, where the ward's estate has been found indebted to the guardian on a settlement of accounts. *Shollenberger's Appeal*, 21 Pa. St., 337 (1853).

As to *fi. fa. against personalty* and practice thereon, see Brews. Prac., Vol. II, §§3183–3194.

As to *fi. fa. against corporations* and practice thereon, see Ibid, §§3199–3203.

As to *fi. fa. against real estate* and practice thereon, see Ibid, §§3205–3211.

As to *fi. fa. against life estates* and proceedings and practice thereon, see Ibid, §§3212–3219.

As to *testatum fi. fa.*, see Ibid, §§3220–3227.

As to *fi. fa. to enforce a decree on which a writ of sequestration has issued*, see §3830.

§5006 Form of Petition for Fi. Fa.

In the Orphans' Court of Philadelphia County.

No. . Term, 1893.

In the matter of the estate of A. B., deceased.

To the Honorable, the Judges of the said Court:

The petition of C. D., a creditor of the said estate, respectfully represents:

First. That on the (date), E. F. was duly appointed executrix of the estate of A. B., deceased, by the Register of Wills of Philadelphia County.

Second. That on the (date) the said executrix filed her final account, which was duly audited by your Honorable Court on the (date) and the adjudication thereon was filed on the (date). On the (date) the schedule of distribution was filed and it was therein adjudged and decreed that your petitioner was entitled out of the funds in the hands of said executrix to the sum of eight thousand dollars; the said adjudication and schedule of distribution were absolutely confirmed on (date).

Third. That on the (date) an order to pay was granted by your Honorable Court, and a certified copy of said decree was (date), served personally on the said E. F., but the said executrix has failed to pay said sum or any part thereof.

Wherefore your petitioner prays that an execution in the nature of a *fieri facias* may issue from this court against the said E. F., for the collection of the said sum, with interest and costs.

And your petitioner will ever pray, etc.

C. D.

CITY AND COUNTY OF PHILADELPHIA, *ss.*

C. D. being duly affirmed according to law, declares and says that the facts above set forth are true.

Affirmed to and subscribed before me this (date). } (Signature of C. D.)

G. H.,

Notary Public.

Endorsement.

No. . Term, 1893.

Estate of A. B., deceased.

O. C.

And now (date) on consideration of the within petition and on motion of L. M., *pro* petitioner *fi. fa.* awarded as prayed for, returnable the first Monday of March, 1893.

(Initials of Judge.)

§ 5007 Form of Writ of Fi. Fa.

PHILADELPHIA COUNTY, *ss.*

The Commonwealth of Pennsylvania.

To the High Sheriff of the City and County of Philadelphia, Greeting:

We command you, that of the goods and chattels, lands and tenements of A. B., in your bailiwick, you cause to be levied a certain sum of which to C. D., lately in our Orphans' Court for the County of Philadelphia, was awarded, adjudged and decreed by said court, on the day of , A. D. 1893, to be paid to the said C. D., as and for and on account of the estate of G. H., deceased, of whose estate the said A. B. was the executor, whereof the said A. B. is convict, as appears of

record, etc.; and to enforce the payment of said sum and costs, in compliance with the said decree, our said court on the day of , A. D., 1893, did allow a writ of execution in the nature of a writ of *fieri facias* to issue; and have you that money before our Judges, at our said Court at Philadelphia, there to be held on the first Monday of next, to render to the said C. D. for his said sum, decree and costs; and have you then there this writ.

Witness the Honorable WILLIAM B. HANNA, president of our said court, at Philadelphia, this day of in the year of our Lord one thousand eight hnndred and ninety-three.

L. M.,
Clerk of Orphans' Court.

The writ of *fi. fa.* must strictly pursue the judgment and be warranted by it. It should recite the decree in the body of the writ. *Peckham's Estate*, 1 Kulp 353 (1882).

As to *vend. ex.* and practice and proceedings thereon, see Brews. Prac. Vol. II, §§3231–3232.

As to *vend. ex. against life estates* and practice thereon, see Ibid, §§3214–3219.

As to *testatum vend. ex.*, see Ibid, §§3220–3227. See, also, chapter on "History, Organization, Process," etc.

§ 5008 Form of Petition for a Vend. Ex.

IN THE ORPHANS' COURT OF PHILADELPHIA COUNTY.

No. . Term, 1893.

In the matter of the estate of A. B., deceased.

To the Honorable, the Judges of the said Court:

The petition of C. D. respectfully represents:

I.

That on the (date) your Honorable Court awarded a *fi. fa.* directed to the Sheriff of Philadelphia County against E. F., at the instance of your petitioner for the sum of $8,000, with interest thereon from the (date), returnable the first Monday of March, 1893.

II.

That the said Sheriff by virtue of said writ levied upon defendant's interest in certain real estate situate in said county.

III.

That the said Sheriff has returned that in obedience to said writ he has seized and taken in execution the said real estate and that upon due and legal notice he held an inquisition on the (date) at Philadelphia, Pennsylvania, and that the said jury found that the rents, issues and profits arising from defendant's interest in said real estate are not of a clear yearly value beyond all reprises sufficient to satisfy said judgment with interest and costs within seven years, and that said property was condemned and remains unsold for want of buyers.

IV.

Wherefore your petitioner prays that an execution in the nature of a *venditioni exponas* may issue from this court directed to the Sheriff of said county, for the collection of the said sum with interest and costs.

And your petitioner will ever pray, etc.

C. D.

CITY AND COUNTY OF PHILADELPHIA, *ss.*

C. D., being duly affirmed according to law, says that the facts stated above are true.

Affirmed to and subscribed before me this (date). } (Signature of C. D.)

G. H.,
Notary Public.

Endorsement.

No. . Term, 1893.

Estate of A. B., deceased.

O. C.

And now, (date), on consideration of the within petition and on motion of L. M., *pro* petitioner, *vend. ex.* awarded as prayed for. Returnable sec. leg. (Initials of Judge.)

§5009 Form of Writ of Vend. Ex.

PHILADELPHIA COUNTY, *ss.*

The Commonwealth of Pennsylvania.

To the High Sheriff of the City and County of Philadelphia, Greeting:

Whereas, by a writ of execution in the nature of a writ of *fieri facias*, bearing teste the day of A. D. 1893, we commanded you, that of the goods and chattels, lands and tenements of A. B., in your bailiwick, you should cause to be levied a certain sum of dollars, which to C. D. lately, in our Orphans' Court for the county of Philadelphia, was awarded, adjudged and decreed by said court, on the day of A. D. 1893, to be paid to the said C. D., as and for and on account of the estate of G. H., deceased, of whose estate the said A. B. was the executor, whereof the said A. B. is convict, as appears of record, etc., and to enforce the payment of said sum and costs, in compliance with the said decree, our said court, on the day of A. D. 1893, did allow a writ of execution in the nature of a writ of *fieri facias* to issue, and that you should have that money before our Judges, at our said Court at Philadelphia, there to be held on the first Monday of next, to render to the said C. D. for his said sum, decree and costs; at which day, before our judges at Philadelphia, you returned that, by virtue of the said writ to you directed, you had seized and taken in execution (here follows description of real estate levied upon under the *fi. fa.*), with the appurtenances, which remained in your hands unsold for want of buyers, so that you could not have the moneys in the said writ mentioned at the day and place therein named, to render to the said C. D., for the said debt, decree and costs, as by the said writ you were commanded. And the residue of the execution of said writ appeared in a certain schedule thereunto annexed; by which schedule or inquisition it appears that the rents, issues and profits of the premises are not of a clear yearly value, beyond all reprises, sufficient within the space of seven years to satisfy the said debt, decree and costs in the said writ mentioned.

Therefore, we command you, that the said premises and the appurtenances, so seized and taken in execution, you expose to sale, and that you have that money before our Judges at Philadelphia, at

our Orphans' Court, there to be held on the first Monday of next, to render to the said C. D. for the said debt, decree and costs, and have you then and there this writ.

Witness the Honorable President Judge of our said court, at Philadelphia, this day of in the year of our Lord one thousand eight hundred and ninety-three.

L. M.
Clerk of Orphans' Court.

§ 5010 Writs of Attachment Execution May Issue—Service.

Whenever any person against whom a decree for the payment of money has been made by the Orphans' Court of any county is possessed of or entitled to any stock, deposits or debts due him, or to any legacy or interest in the estate of a decedent, the same may be levied on or attached in satisfaction of such decree, by the same process and in the same manner as is provided by the Act of June 16, 1836, entitled "An act relating to executions," and by the tenth section of the Act of April 13, Anno Domini 1843, entitled "An "act to convey certain real estate and for other purposes," a writ of attachment for said purpose may be allowed by said court, or any Judge thereof, as writs of *fieri facias* in said court are now allowed, and may be served out of the county in which the same may be issued, but service on the party against whom such decree was made shall not be required if he be not found in said county. (Act March 27, 1873, §1, Br. Purd., 1285, §56).

The writ of attachment execution issues from the Orphans' Court upon a decree against a defendant for property or effects in the hands of a third party. In practice this writ has superseded the writ of sequestration, except in cases of income from life estates and of corporations.

The writ is issued on petition and directed to and served by the Sheriff or Coroner of the county.

As to *attachment-execution and the practice* and proceedings thereon, see Brews. Prac., Vol. II, §§3253–3314.

As to *attachment-execution against corporations*, see Ibid, §3199.

§ 5011 Form of Petition for Attachment Execution.

IN THE ORPHANS' COURT OF PHILADELPHIA COUNTY.

No. . Term, 1893.

Estate of A. B., deceased.

To the Honorable, the Judges of the said Court:

The petition of C. D. respectfully represents:

First. That on the (date) E. F. was granted letters of administration on the estate of A. B., deceased, by the Register of Wills of Philadelphia County.

Second. That on the (date) the said administrator filed his account, which was duly audited, and the adjudication thereon was filed on the (date) and absolutely confirmed on the (date). That by said adjudication it was decreed that your petitioner was entitled out of the balance in the hands of said administrator for distribution belonging to said estate, to the sum of dollars.

Third. That on the (date) a petition for an order to pay was presented to your Honorable Court and an order granted (date); that a certified copy of said order was served personally on said E. F., but he has failed to comply therewith.

Fourth. That your petitioner is informed and believes and therefore avers that there are (certain goods, chattels, stocks, moneys, interests or debts) belonging to the said E. F. in the hands of G. H., the right to which is in the said E. F.

Wherefore your petitioner prays that an execution in the nature of an attachment execution may issue from this court against the said E. F., defendant, and the said G. H., garnishee, and against any or all persons in whose hands or possession said goods and chattels, stocks, moneys, interests and debts, or any of them belonging to the said defendant, may be attached for the collection of the said sum, with interest and costs.

And your petitioner will ever pray, etc.

C. D.

(Affidavit as to truth of facts.)

Endorsement.

(Caption.)

And now (date) on consideration of the within petition and on motion of L. M., *pro* petitioner, attachment execution against E. F., defendant, and G. H., garnishee, and any and all persons in whose hands or possession the said goods and chattels, stocks, moneys, interests and debts, or any of them, may be attached, awarded as prayed for. Returnable, sec. leg.

(Initials of Judge.)

§ 5012 Form of Writ of Attachment Execution.

COUNTY OF PHILADELPHIA, *ss.:*

The Commonwealth of Pennsylvania.

To the Sheriff of the County of Philadelphia, Greeting:

WE COMMAND YOU that you levy upon and attach the goods and chattels, stocks, moneys and interests of and debts due to E. F., in satisfaction of a certain decree, obtained in our Orphans' Court of the County of Philadelphia, at the instance of C. D. against the said E. F., of Term, 1893, No. , for the sum of dollars and cents, with interest from the day of , 1893, and costs which to C. D., lately in our Orphans' Court, of Philadelphia County, was awarded, adjudged and decreed on the (date) to be paid to the said C. D., as and for and on account of the estate of A. B., deceased, of whose estate E. F. was the executor, whereof the said E. F. is convict, as appears of record, etc., and to enforce the payment of said sum and costs in compliance with the said decree, our said court on the (date) did allow a writ of execution in the nature of a writ of attachment execution to issue.

And, also, that by honest and lawful men of your bailiwick, you make known to the said E. F. and to G. H. and all other persons in whose hands or possession the said goods and chattels, stocks, moneys, interests and debts, or any of them, may be attached as garnishees, that they be and appear before our said court at Philadelphia, on the first Monday of next, to show if anything they, the said defendant or the said garnishees, have to say why the

said judgment, besides costs of suit, should not be levied of the effects of the said defendant in the hands of the said garnishees. And have you then and there this writ.

Witness the Honorable , President Judge of our said court at Philadelphia the day in the year of our Lord one thousand eight hundred and ninety-three.

L. M.,
Clerk of Orphans' Court.

§5013 Testatum Writs Against Executor, etc.

When any executor, administrator or guardian shall reside or move out of the county in which his appointment shall have taken place, or shall not possess real or personal estate in such county sufficient to satisfy any decree or order of the Orphans' Court of such county, it shall be lawful for the Orphans' Court of such county to issue process to the county in which such executor, administrator or guardian may be, or in which he may have any real or personal estate, amenable to such process; and such process shall be executed by the Sheriff or Coroner, as the case may require, of the county in which such executor, administrator or guardian may be, or may possess real or personal estate as aforesaid. (Act March 29, 1832, §57, Br. Purd., 1285, §54.)

By the Act of April 21, 1846, §2 (Br. Purd., 1285, §55), recited at length at §3832, it is provided that such writs shall be executed and have the same force as if issued out of the Common Pleas.

Where a defaulting executor has no real or personal estate within the county, a *testatum fi. fa.* may be issued, by leave of the Orphans' Court, to another county in which the executor has property amenable to process. *Helfrich* vs. *Stern*, 17 Pa. St., 144 (1851).

As to testatum writs of execution, and the practice thereon, see Brews. Prac., Vol. II, §§3220–3227.

§ 5014 Form of Petition for a Testatum Fi. Fa.

IN THE ORPHANS' COURT OF PHILADELPHIA. COUNTY.

Term, 1893. No. .

In the matter of the estate of A. B., deceased.

To the Honorable, the Judges of the said Court:

The petition of C. D. respectfully represents:

First. That on the (date) proceedings were begun in your Honorable Court for the dismissal of E. F. from the office of executrix on the grounds of waste and non-residence, and on the (date) it was ordered and decreed that the letters testamentary granted to E. F. as executrix of said A. B., deceased, be vacated and that she be removed from her said office.

Second. That on the (date) letters of administration d. b. n. c. t. a. on said estate were granted to your petitioner by the Register of Wills of Philadelphia County.

Third. That by the adjudication *sur* the account of E. F., executrix, and the schedule of distribution, which were absolutely confirmed on the (date), the said executrix was surcharged with the sum of dollars, of which sum for distribution your petitioner was awarded dollars, and which sum the said E. F. has failed to pay or any part thereof.

Fourth. That your petitioner is informed and believes and therefore avers that the said E. F., is now a citizen of the State of New York, and has no real or personal estate in the County of Philadelphia, but has real estate in the County of Luzerne.

To a writ of *fi. fa.*, against said E. F,, issued out of your Honorable Court (date) the Sheriff of Philadelphia County has returned *nulla bona.*

Wherefore your petitioner prays that an execution in the nature of a *testatum fi. fa.* may issue from this court directed to the Sheriff of the County of Luzerne against the said E. F. for the collection of the said sum, with interest and costs.

And your petitioner will ever pray, etc.

C. D.

CITY AND COUNTY OF PHILADELPHIA, *ss.:*

C. D., being duly affirmed according to law, says that the facts stated as of his own knowledge are true, and those stated on information and belief he believes to be true.

Affirmed to and subscribed before me this (date.) } (Signature of C. D.)

G. H.,
Notary Public.

Endorsement.

Term, 1893. No. .

Estate of A. B., deceased.

O. C.

And now (date), on consideration of the within petition and on motion of L. M., *pro* petitioner, *testatum fi. fa.* to Luzerne County awarded as prayed for. Returnable the first Monday of March, 1893.

(Initials of Judge.)

§ 5015 Lev. Fa. May Issue.

The Orphans' Court has power to award a writ of *levari facias* to collect a charge against the real property of a defendant in favor of the petitioner. *Hart* vs. *Homiller*, 23 Pa. St., 43 (1854).

For practice and proceedings on a *levari facias*, see Brews. Prac., Vol. II, §§3238-3241.

§ 5016 Decree Cannot be Revived.

The law has not provided for a *sci. fa.* on the decree of the Orphans' Court. *Weyand's Appeal*, 62 Pa. St., 198 (1869), and the writ of execution issues at any time.

If you desire to keep alive your lien against the estate of a defaulting executor, it is better to file in the Common Pleas a transcript of the balance due, and to keep that judgment alive.

§5017 Certified Transcripts of Amounts Due by Executor, Administrator, Guardian or Other Accountant to be Filed in Common Pleas —Liens—Sci. Fa.—Provisions as to Increase or Reduction of the Amount on Appeal.

It shall be the duty of the Prothonotary (Prothonotaries) of the courts of Common Pleas of the respective counties, to file and docket, whenever the same shall be furnished by any parties interested, certified transcripts or extracts of the amount appearing to be due from or in the hands of any executor, administrator, guardian or other accountant, on the settlement of their respective accounts in the Orphans' Court, which transcripts or extracts so filed, shall constitute liens on the real estate of such executor, administrator, guardian or other accountant, from the time of such entry, until payment, distribution or satisfaction, and actions of debt or *scire facias* may be instituted thereon, by any person or persons interested for the recovery of so much as may be due to them respectively: *Provided, however*, That the liens thereby created, shall cease at the expiration of five years from the time of the entry aforesaid, unless revived by *scire facias*, in the manner by law directed, in the cases of judgments in the courts of common law: *And provided further*, That in case of an appeal from the Orphans' Court, the liens shall be for no more than the amount finally due and decreed in the Supreme Court, and it shall be the duty of the Prothonotary of the Common Pleas, on such decree of the Supreme Court being certified to him, to enter on his docket the amount so found due and decreed by the Supreme Court, and if such amount be greater than that decreed by the Orphans' Court, the lien for such excess shall take effect only from the time of entering the decree of the Supreme Court; but if the amount be reduced by the final decree of the Supreme Court, the Prothonotary shall reduce the amount originally entered on his judgment docket and index accordingly; and such final decree upon appeal, being certified and filed in the said Court of Common Pleas, the said term of five years shall be counted from the time of such entry. (Act March 29, 1832, §29, P. L., 197.)

The act was interpreted according to its terms in *Eichelberger* vs. *Smyser*, 8 Watts, 183 (1839).

Under the twenty-ninth section of the Act of March 29, 1832, a transcript of a balance due by executors may be filed in a different county from that in which probate was made. *Hanson* vs. *Bank*, 7 Pa. St., 261 (1847).

Such transcript may be filed where the account is a *partial* one *Royer* vs. *Myers*, 15 Pa. St., 87 (1850).

The transcript is subject to modification on appeal, bill of review or otherwise, as the Orphans' Court may direct. *McNeal* vs. *Holbrook*, 25 Pa. St., 189 (1855).

§ 5018 Form of Certificate.

STATE OF PENNSYLVANIA, } ss.:
COUNTY OF . }

I certify that at an Orphans' Court for the county aforesaid, held at , on (date), before the Honorable , President Judge of said Court.

In the matter of the estate of A. B., deceased.

The adjudication on the account of C. D., executor of said estate, was confirmed absolutely on the above date, and by the same it appears that the balance due to E. F. and L. M. by the said executor on the settlement of his account is the sum of dollars, and I further certify that the awards in said adjudication contained are not satisfied of record.

Witness my hand and the seal of said court (date).

G. H.,
Clerk of Orphans' Court,

[SEAL]

For form, see also *McCracken* vs. *Graham*, 14 Pa. St., 209 (1850).

§ 5019 Decree May be Transferred to Another County and There be Enforced.

See chapter "History and Organization," §3834.

§ 5020 Advantage of Filing Certificate.

By means of filing a transcript in the Common Pleas, you proceed with your execution as if your judgment had been obtained in the Common Pleas. The jurisdiction of the Orphans' Court being statutory, questions may arise as to the right to issue an execution in particular cases. This is obviated by filing the transcript. The practice of presenting a petition for an order to pay previous to the presentation of the petition in the Orphans' Court for a writ of execution, is often inconvenient and the petition for the writ itself is, sometimes, a serious blow to the effectiveness of the writ, as the defendant may obtain a knowledge of the intended execution.

§ 5021 Filing Certificate Does Not Prevent Issuing of Writ in the Orphans' Court.

A certificate of a balance against an accountant filed in the Common Pleas does not prevent the issuing of a *vend. ex.* from the Orphans' Court. *Weyand's Appeal*, 62 Pa. St., 198 (1869).

The general rule is that a plaintiff may have as many executions at the same time as the law affords, and pursue each until his judgment is satisfied. *Pontius* vs. *Nesbit*, 40 Pa. St., 309 (1861); *Tams* vs. *Wardle*, 5 W. & S., 223 (1843).

§ 5022 Sci. Fa. on the Transcript.

A *sci. fa.* may issue on the transcript, although the lien created upon the real estate by its entry may have been lost. Such proceeding is in the nature of an action of debt on a judicial decree. *Burd* vs. *McGregor*, 2 Grant, 353 (1857).

The personal representatives of a deceased executor must be made parties to the *sci. fa.* *Rowland* vs. *Harbaugh*, 5 Watts, 365 (1836).

The transcript must be filed during the life of the accountant. (*Ibid.*)

As to other matters, see generally chapter on "Execution," Brewster's Practice.

CHAPTER XXI.

APPEALS.

§ 5023

In Vol. II, Chap. XLVI, Brews. Prac., will be found all the statutes, decisions and forms as to appeals from the Orphans' Court and from other courts.

The Notice of Appeal Required in the Orphans' Court—When an Appeal Lies from the Orphans' Court—What is a Final Decree—Appeals in Cases of Guardians—Of Account—Distribution—Sales of Land—Of Grant of Re-hearing—The waiver of right to appeal, and in general, the *practice on appeals*, are all there discussed.

Appeals in proceedings under the Price Act. See §4791.

§ 5024 Appeals from the Register to the Orphan's Court.

Where lack of testamentary capacity and undue influence are charged, the appellant may file a petition similar in form to the following:

IN THE ORPHANS' COURT OF PHILADELPHIA COUNTY.

Term, 1893. No. .

In the matter of the estate of M. S., late of the City and County of Philadelphia and State of Pennsylvania, deceased.

To the Honorable, the Judges of the said Court:

The petition of D. B., niece and heiress-at-law of M. S., deceased, respectfully represents:

That M. S., late of the City and County of Philadelphia and State of Pennsylvania, departed this life on the day of , A. D. , seized at the time of her death of certain real and personal estate in the said county and elsewhere.

That on the day of , A. D. , a certain paper-writing, bearing date the day of , A. D. , and alleged to be the last will and testament of the said decedent, was admitted to probate by the Register of Wills of said Philadelphia County, and letters testamentary thereon were granted to H., a copy of which said paper is hereto annexed, marked "Exhibit A," and made part hereof.

That on the day of , A. D. , your petitioner filed her appeal from the said judicial act or decision of the said Register of Wills, duly entered the security reqired by the Act of Assembly of June 6, 1887, and the record of the proceedings had before the said Register has been duly certified by him and filed in this court.

That at the time of the alleged execution of the said paper-writing the said M. S. was of the advanced age of ninety-two years, very feeble and was not of sound disposing mind, memory or understanding, or capable of making a valid will; and said writing was procured by undue influence exercised by G., H. and I., and others whom your petitioner is at this time unable to name with precision. The following being a statement of the facts and circumstances upon which your petitioner relies, and of the time and place when and where the said undue influence was exercised inducing and compelling the execution of the said paper-writing and the names of the persons by whom such undue influence was used, as she is informed, believes and expects to be able to prove, to wit, that the said M. S. had resided for about thirty years before her death at No. street, Philadelphia, and for the past twenty-five years her niece, the said G., with her husband, the said H., and the said I., and other members of their family had resided and made their home with decedent; that the said H. had for many years been the confidential adviser of said M. S., had purchased and sold real estate for her, transacted all her financial affairs, and

knew the extent and value of her estate better than she did; that for two years prior to her death she was very infirm, and had the shaking palsy, and was easily influenced by those with whom she was intimately connected and who often came in contact with her; that on several occasions during the year prior to her death, decedent desired to give to petitioner and members of her family gifts as keepsakes, but she did not dare to—as she said it would cause a disturbance with members of her household—that for years prior to her death, decedent never transacted any business, employed or discharged any servants, or did any trifling thing without first consulting said G., H. and I.; that about two years before her death, decedent stated to witnesses, that she was under the influence of her niece, said G. and her husband H., and that said G. had purchased new furniture against her protest, and would not permit her to discharge a man servant, in the employ of the decedent, whom she greatly disliked; that your petitioner is informed that in the latter part of the year , decedent objected strongly to said H. taking any counsel or advice from A. B., a lawyer, or bringing him to the house, and stated forcibly her objections to him; that in the month of the decedent made a declaration that she would not leave any keepsakes or old-fashioned things to said G., because she did not think she would appreciate them; that your petitioner is informed that early in the year 1893, the decedent executed a will and placed it in the keeping of her lawyer, C. D., with the instruction to allow no one to examine it, and said G. and H. knew of this will, but were not present at its execution and were ignorant of its contents; that on they procured their lawyer, said A. B., and he prepared another will, which they by coercion induced decedent to execute and by this will the bulk of decedent's estate is given to said G.; her son, said I., is forgiven debts due the decedent to the extent of twenty thousand dollars and her husband, said H., is made sole executor of the said will, and a small portion of the estate is given to your petitioner, while the remaining two nieces receive nothing.

That the said decedent left to survive her no husband, no father, no mother, no brothers or sisters, no children or other heirs and next of kin, save four nieces, G., wife of H.; R., widow of K.; L. and your petitioner, D. B., who by the intestate laws are entitled to her real and personal estate.

That your petitioner had no knowledge of the existence or probate of the said paper until after the date of the said probate.

That certain material questions are in controversy between your petitioner and G., H., I., etc., and H., called executor and trustee, viz.:

(*a*) Whether at the time of the alleged execution of said paper, said M. S. was of sound disposing mind, memory and understanding.

(*b*) Whether the said instrument was not procured by the undue influence of said G., H., I. and others.

Your petitioner, believing that said M. S. was not, at the time of the alleged execution of said paper, of sound, disposing mind, memory or understanding, and further, that said paper was procured by the undue influence of said G., H., I. and others, as hereinbefore set forth.

Wherefore your petitioner prays that a citation may issue, directed to the said G., H., I., etc. (name all devisees and legatees and all interested in sustaining the will), W. and H., called executor and trustee, who are the only persons interested, excepting your petitioner, commanding them to appear before the court on a day certain, to answer this petition and to show cause why said appeal from the decision of the said Register of Wills, in admitting said instrument of writing to probate as the last will and testament of the said M. S., deceased, should not be sustained and the decision of the said Register set aside, and why an issue *devisavit vel non* should not be awarded, directed to the Court of Common Pleas of Philadelphia County, to determine the following questions of fact, in the form thus specifically set forth, to wit:

First. Whether the said M. S. was, at the time of the alleged execution of said instrument, of sound, disposing mind, memory and understanding, and of sufficient legal capacity to make a valid will and testament.

Second. Whether the said M. S. was induced to make said paper writing by undue influence of the said G., H., I., etc., or others.

And why said probate should not be set aside and the letters testamentary granted to H. as executor thereof be revoked.

And your petitioner will ever pray, etc.

D. B.

STATE OF PENNSYLVANIA, } *ss.*
COUNTY OF PHILADELPHIA, }

D. B., the petitioner above named, having been duly sworn according to law, doth depose and say:

1. That the facts set forth in the foregoing petition are true and correct.

2. That the persons named in the petition are the sole heirs-at-law of M. S., formerly of the City of Philadelphia, now deceased.

3. That at the date of the alleged will referred to in the foregoing petition, the said M. S. was not of sound, disposing mind, memory or understanding.

4. That the said alleged will was procured by the undue influence of G., H., I., and others upon and over the said M. S.

5. That the facts stated in Articles 3 and 4 of this affidavit are material and are in controversey between said G., H., I., etc., and H., called executor and trustee, and said deponent.

Sworn to and subscribed before me this day of December, A. D. 1893. } D. B.

E. F.,
[SEAL] *Notary Public.*

DECREE.

And now to wit, , A. D. 1893, on consideration of the foregoing petition and on motion of N., *pro* petitioner, the court order that a citation issue directed to G., H., I., J., etc., and H., called executor and trustee, commanding them to appear before the court on the day of , 1893, to answer the petition of D. B., and show cause why an appeal should not be sustained from the decision of the Register of Wills of Philadelphia County, made on the day of , A. D. , admitting to probate as the last will and testament of M. S., deceased, a certain instrument of writing, dated the day of A. D. , and the decision of the said Register set aside, and why an issue *devisavit vel non* should not be awarded, directed to the Court of Common Pleas of Philadelphia County, to determine the following questions of fact, viz.:

First. Whether the said M. S., at the time of the alleged execution of the said paper writing was of sound disposing mind, memory and understanding, and of sufficient legal capacity to make a valid will and testament.

Second. Whether the said M. S. was induced to make said paper writing by the undue influence of the said G., H., I., etc., or others.

And also why the said probate should not be set aside and the letters testamentary granted to H., as executor thereof, revoked. Notice of said citation to be given to the said Register of Wills.

(Copy of will to be attached.)

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April 10,	§13,	P. L., 571.	Coll. Inher. Tax,	4535
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April 10,	§15,	P. L., 571.	Coll. Inher. Tax,	4535
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April 18,	§6,	P. L.,	503.	Price Act,	4755
April 18,	§7,	P. L.,	503.	Price Act,	4756
April 18,	§8,	P. L.,	503.	Price Act,	4758
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Amendments to the Equity Rules.

And now, January 15th, A. D. 1894, it is ordered that the Equity Rules formulated and adopted May 27, 1865, under the authority of the Act of June 16, 1836, to regulate the practice in the several Courts of Common Pleas in this Commonwealth in proceedings in equity, be amended in the manner herein below set forth; and that such rules, or parts thereof, heretofore in force, as may be inconsistent with these amendments, be rescinded hereby, from and after the date on which these amendments take effect.

The Prothonotary of the Supreme Court for the Eastern District is directed to give notice of these amendments by publishing them in the Legal Intelligencer and in the Weekly Notes of Cases.

The Prothonotary for the Western District is directed to give notice by the publication of the same in the *Pittsburgh Legal Journal.*

The State Reporter is also directed to insert them, together with this order, in the first volume of the State Reports prepared after this date.

Filed January 15, 1894. PER CURIAM.

PLEADINGS.

All defences, in equity cases, shall be made by answer or by demurrer. All issues of fact must be made by answer.

EVIDENCE.

The office of "Examiner to take testimony" is hereby discontinued, except in proceedings conducted under the directions of a statute by which duties are imposed upon an Examiner, as in bills to perpetuate testimony, and similar cases. All testimony in cases in equity shall be taken in the same manner as is now practiced in courts of law; upon rule, commission, letters rogatory, or in open

court. Rules may be entered for the purpose of taking testimony on the equity side of the several Courts of Common Pleas, in the same manner, and with the same effect, as upon the common law side of the same courts.

HEARING.

The hearing of cases in equity shall be conducted before the Judge sitting as Chancellor, or before a referee, and the office of Master in Chancery is hereby discontinued, except in proceedings where decrees or interlocutory orders are to be executed, or their execution supervised by an officer of the court; as in partition, the sale of real estate, the execution of deeds and the like. When a case in equity is at issue upon demurrer, it shall be placed on the argument list then next to be heard. When it is at issue upon answer, it shall be placed on the equity trial list. Cases upon the trial list shall be heard in court in the same manner that actions at law wherein trial by jury has been waived are now heard by courts of law. The evidence shall be given or read in open court, and exceptions to the admission or rejection of evidence, and of witnesses, may be taken in the same manner, and with the same effect, as is now practiced in the trial of actions at law. The Judge shall sit continuously during the trial of causes in equity in the same manner as during the trial of actions at law.

FINDINGS.

The counsel for the respective parties may present to the Judge, sitting as Chancellor, requests for findings both of fact and law. After hearing the evidence, and the suggestions or argument of counsel, the Judge may adopt or affirm these requests, or any of them, he may qualify or deny them, or he may state his findings of fact or of law in his own language. The requests so presented, with the answers thereto, and the findings of the Judge, both of law and fact, shall be filed by the Prothonotary, and become thereby part of the record of the Court in the said case.

REFEREES.

When a case in equity is at issue upon answer it may be taken from the list by the parties, and its trial referred to a person agreed upon by them, who shall be called a "referee." He shall proceed at once upon his appointment to fix a day for trial, which shall not

be more than three months after his said appointment; at which time, unless the cause be continued, he shall proceed to hear the parties, and sit from day to day, continuously, for that purpose. He shall hear the testimony, seal bills of exceptions to the admission and rejection of evidence, make findings of fact and of law, act upon the points or requests that may be presented by counsel, and prepare the form for a final decree. When his findings and decrees are ready, he shall give notice to counsel for the respective parties, of a time and place, when and where the same may be examined by them. If no exceptions be filed within ten days after the day fixed for such examination, the referee shall deliver to the Prothonotary his findings, the requests of counsel, and the form of decree prepared, who shall file the same, and thereupon the Court shall enter the decree prepared by the referee. If exceptions be filed, the referee shall hear them within ten days thereafter; and within ten days after such hearing, decide upon the same and file said exceptions, his action thereon, together with his original findings, the requests of counsel, and the form of a decree, with the Prothonotary of the Court. At any time within ten days after this is done, exceptions may be taken to the action of the referee and filed with the Prothonotary. The case shall thereupon be placed upon the equity argument list next to be heard in said court, and the exceptions heard by the Court or Judge acting as Chancellor in the case, and disposed of; whereupon the proper decree shall be made and entered, subject to the right of appeal to the Supreme Court, as provided by law.

ACCOUNTS.

In cases involving complicated accounts, or questions requiring the aid of experts, if the parties do not refer, the Court may call in the aid of an accountant, or other expert, as an assessor. The charges to be allowed for such services shall not exceed the rate *per diem* commonly paid by business men for similar services, and shall be taxed as costs in the case, or paid as the Court may direct.

TRIAL.

A trial in equity shall be conducted, as near as may be, as a trial at law is now conducted. When entered upon, it shall not be interrupted or postponed, except for cause shown to, and approved

by, the court or referee; and the costs of all such postponements shall be paid by the party at whose instance the same may be ordered, and shall not abide the result, or be taxed in the general bill of the successful party. Continuances for cause may be made where the list is called, with or without terms, as is now practiced in the courts of common law.

TRIAL BY JURY.

After a case in equity is at issue upon questions of fact, either party may move a rule upon the other party, to show cause, on five days' notice, why the issues of fact, or some of them, shall not be tried before a jury. If, on the return of the rule, such trial be awarded, the court shall frame the issues in the form of separate questions. The verdict rendered shall not be general, but shall consist of an answer to each question so submitted. These answers, made to inform the conscience of the Chancellor, shall not be binding upon him in any case.

TRIAL AND ARGUMENT LISTS.

The preparation of trial and argument lists shall be regulated by an order of the several courts, so as to make the practice in regard thereto conform as nearly as may be practicable to the practice in the said courts in actions at law.

INJUNCTION CASES.

Preliminary injunctions may be granted, in accordance with the present practice, on bill and injunction affidavits; but upon the hearing, at the end of four days, or such other time as may be fixed, the evidence must be taken subject to cross-examination, and *ex parte* affidavits will not be received. Witnesses may be examined orally before the Judge, or testimony may be taken on short rule, or, when necessary, testimony may be taken before any person authorized to administer an oath, on notice to the other side to appear and cross-examine. In cases when testimony is taken on notice alone, the certificate of counsel that he had not sufficient time to enter and serve a rule, shall stand in lieu of such formal entry and service.

FEES.

The fees of referees shall be adjusted upon a statement of the number of days actually occupied with the trial and the preparation of the findings and decree. Parts of days on which the parties met and adjourned shall not be included. For days actually spent in the trial and disposition of the case a per diem shall be allowed, "fixed by the court in which the cause is pending, upon consideration of the character of the labor actually performed, but in no case to exceed twenty dollars per day. The referee shall state separately the number of days occupied in the trial, and those occupied in preparing the findings and decree." For parts of days on which meetings and adjournments have taken place the referee shall be allowed five dollars each, to be paid by the party at whose instance the adjournment may be made and not otherwise.

APPEALS.

Whenever an appeal shall be taken from an order or decree in equity the appellant shall file in the court below, with his notice of appeal, a brief statement of the errors he alleges to have been made by the order or decree appealed from or the findings on which it rests. No other errors shall be assigned in the Supreme Court unless leave be granted on motion and notice to the other party. If the reasons for the appeal do not affect the whole decree, and its enforcement, as to so much as is not complained of, is not inconsistent with the relief asked on appeal, leave will be granted to proceed as to that part of the decree, notwithstanding the appeal.

STENOGRAPHERS.

The evidence on the trial of cases in equity may be taken by stenographers in the same manner and under the same rules as to noting exceptions and filing the notes of the trial as are in force on the law side of the several courts.

APPEARANCE AND ANSWERS.

Unless otherwise provided by law, the defendant or defendants shall be required, in the first instance, to appear and answer the exigency of the bill, by the service upon each defendant therein named of a printed copy thereof, on which shall be endorsed a notice in the following form:

You are hereby notified and required to cause an appearance to be entered for you in the within-named court and file your answer to the within bill of complaint within fifteen days after the service hereof on you, and to observe what the said court shall direct. You are also notified that if you fail to enter your appearance and file your answer within fifteen days, you will be liable to have the bill taken *pro confesso*, and a decree made against you in your absence.

(Here insert date of notice.)

Solicitor for Plaintiff.

In cases in which the defendant cannot prepare his answer within fifteen days, the court may, on motion with notice, extend the time for answer, not exceeding thirty days additional.

It is further ordered that these amendments shall take effect on the first Monday of March next, and be applicable to all cases in equity put at issue either on answer or demurrer on or after that day.

[The above Amendments were promulgated too late to be inserted in the body of this work.]

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